No. 88-864

Supreme Court, U.S.
FILED
NOV 21 1988
JOSEPH F. SPANIOL, JR.
CLERK

In The
Supreme Court of the United States
October Term, 1988

JOSEPH STOUT and BARBARA STOUT,

Petitioners,

v.

A.M. SUNRISE CONSTRUCTION COMPANY, INC., and COLE & ASSOCIATES, INC.,

Respondents,

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF INDIANA AND THE INDIANA COURT OF APPEALS

LEONARD M. RING AND ASSOCIATES
111 West Washington Street
Chicago, Illinois 60602
(312) 332-1765

YOUNG & YOUNG
118 North Delaware Street
Indianapolis, Indiana 46204
(317) 639-5161
Attorneys for Petitioner

Of Counsel:
LEONARD M. RING*
HOWARD S. YOUNG, JR.

**Attorney of Record*

American Reprographics Management, Inc.™ (312) 332-ARMI (800-999-6239)

QUESTIONS PRESENTED

1. Whether dismissal of a plaintiff's complaint as a sanction for allegedly failing to comply with a discovery order is a denial of due process where the defendants hid documents which the plaintiff needed for compliance and harrassed the plaintiff's expert so that he withdrew from the case?

2. Is it a denial of due process to dismiss a complaint as a sanction for noncompliance with a discovery order where no finding was made that plaintiff's alleged failure was willful or in bad faith, and where defendants were not prejudiced because the information had already been provided except for plaintiffs' expert's opinion and the underlying technical data needed by plaintiff's expert to give his opinion was in the documents defendants had hidden — and thus already had within their knowledge and control?

3. Is it a denial of due process where the plaintiff, a paraplegic, suffers dismissal of his complaint for the alleged failure of his counsel to make adequate responses to interrogatories and the plaintiff is totally blameless?

TABLE OF CONTENTS

Page

QUESTIONS PRESENTED i

OPINIONS BELOW 1

JURISDICTION 2

CONSTITUTIONAL PROVISIONS INVOLVED 2

STATEMENT OF THE CASE 2

REASONS FOR GRANTING THE WRIT 7

I. DISMISSAL OF STOUTS' COMPLAINT AS A SANCTION FOR NONCOMPLIANCE WITH PRETRIAL DISCOVERY REQUESTS DEPRIVED THEM OF DUE PROCESS; DEFENDANTS WERE NOT PREJUDICED BY STOUTS' ACTS; DEFENDANTS OBSTRUCTED JUSTICE; THE TRIAL COURT NEVER FOUND THAT STOUTS' FAILURE WAS WILLFUL OR IN BAD FAITH; AND STOUTS' COMPLIANCE WAS SUFFICIENT 7

A. Defendants Were Not Prejudiced By Stouts' Conduct 8

B. Defendants Orchestrated Stouts' Inability To Comply With The Court's Orders 9

C. The Trial Court Never Found That Stouts Acted Willfully Or In Bad Faith 11

D. Stouts' Revised Answers to Defendants' Interrogatories Were Sufficiently Specific 12

Page

II. DISMISSAL OF STOUTS' COMPLAINT AS A SANCTION FOR NONCOMPLIANCE WITH PRETRIAL DISCOVERY REQUESTS VIOLATED THEIR DUE PROCESS GUARANTEES WHERE THEY WERE PERSONALLY INNOCENT OF ANY WRONGDOING 15

CONCLUSION 16

TABLE OF AUTHORITIES

Page

E.E.O.C. v. Carter Carburetor, Div. of ACF Industries, 577 F.2d 43 (8th Cir. 1978) 9

Ingalls Shipbuilding Inc. v. United States, (Fed. Cir., No. 88-1204, September 29, 1988) 8, 11

Lolatchy v. Arthur Murray, Inc., 816 F.2d 951 (4th Cir. 1987) 15

National Hockey League v. Metropolitan Hockey Club, Inc., 427 U.S. 639 (1976) 7, 11, 14

Societe Internationale v. Rogers, 357 U.S. 197 (1958) 7, 15-16

No.

In The
Supreme Court of the United States
October Term, 1988

JOSEPH STOUT and BARBARA STOUT,

Petitioners,

v.

A.M. SUNRISE CONSTRUCTION COMPANY, INC., and COLE & ASSOCIATES, INC.,

Respondents,

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF INDIANA AND THE INDIANA COURT OF APPEALS

Joseph Stout and Barbara Stout respectfully petition this Court for a writ of certiorari to the Supreme Court of Indiana and the Indiana Court of Appeals to review the decision of the Indiana Court of Appeals and the decision of the Supreme Court of Indiana refusing to accept their Petition to Transfer.

OPINIONS BELOW

The dismissal orders of the Superior Court of Lake County, Indiana, are set forth in Appendix A (*infra*, pp. A-1 through A-2). The opinion of the Court of Appeals of Indiana, Fourth District, one judge dissenting as to

one defendant, is reported at 505 N.E.2d 500 (Ind. App. 1987) and set forth in Appendix B (*infra*, pp. B-1 through B-8). The denial of Petitioners' Petition to Transfer by the Supreme Court of Indiana, by a three to two vote, is set forth in Appendix C (*infra*, p. C-1).

JURISDICTION

The order of the Supreme Court of Indiana, denying Petitioners' Petition to Transfer, was entered on August 23, 1988. Petitioners invoke this Court's jurisdiction pursuant to 28 U.S.C. §1257(3) (1982).

CONSTITUTIONAL PROVISIONS INVOLVED

AMENDMENT XIV.

§1 Citizenship rights not to be abridged by states

Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States, nor shall any State deprive any person of life, liberty, or property, without due process of law, nor deny to any person within its jurisdiction the equal protection of the laws.

STATEMENT OF THE CASE

The petition stems from a trial court's dismissal of Petitioners' cause of action as a sanction for their failure to provide more complete answers to a handful of interrogatories.

On October 3, 1977, Petitioner Joseph Stout ("Stout"), a journeyman ironworker, was working on a crew that was erecting the steel superstructure of an elementary school. While sitting atop a cross beam so as to secure it to a vertical steel column, the steel column collapsed. Stout rode the falling cross beam approximately fourteen

feet to the ground. His head cracked open; his back broke in three places; and he suffered spinal cord damage. Stout was rendered a paraplegic.

On October 3, 1979, Stout and his wife, Barbara, filed a personal injury action in the Superior Court of Lake County, Indiana. They named the general contractor, A.M. Sunrise Construction Company, Inc. ("Sunrise"), the architectural/engineering firm that designed the building, Cole & Associates ("Cole") and the owner/lessor of the crane used at the site, Central Rent-A-Crane ("Central"), as defendants. Defendants answered the complaint and Sunrise and Central filed third-party actions against Stout's employer, C & C Iron, Inc. ("C & C").

Almost from the beginning of the litigation all parties were dilatory in complying with discovery requests. On May 2, 1980, Stouts served interrogatories and production requests on Sunrise and Cole.[1] Neither defendant filed timely replies. On June 30, 1981, Stouts moved to compel their responses. Pursuant to court order, Sunrise eventually complied on August 13, 1981; Cole filed unsigned answers to the interrogatories and objected to the production request.

On November 12, 1981, without ever having served any discovery requests on Stouts, whatever, Cole filed a Certificate of Readiness, therein certifying that discovery was complete; there had been reasonable disclosure of the contentions by the parties; and that it was ready for trial. Central was not ready for trial, however. It served another set of interrogatories on Stouts, twenty five in number, all asking for Stouts' contentions as to

---

[1] Prior to this time, Sunrise Central and C & C fought amongst themselves. Also Stouts had already answered 89 interrogatories (with 295 subsections) propounded by Central.

Central's negligence. Stouts did not respond. Discovery had shown that neither the crane nor its operator were responsible for the accident. Central then moved for dismissal. Stouts did not object and on October 21, 1982, Central was dismissed with prejudice.

Apparently Cole re-examined its position during this time. On May 21, 1982, Cole filed its first set of interrogatories on Stouts. In September of 1982, Cole moved for sanctions for Stouts' failure to respond, but it did not seek a ruling on this motion. Almost two years later, in May of 1984, Cole renewed the motion. After obtaining an extension of time to answer, due to Stout's having suffered a heart attack, Stouts filed timely answers on August 8, 1984. Cole had no complaint with these answers. On July 24, 1984, the matter was set for pretrial on May 31, 1985, and for trial, the week of July 8, 1985. No discovery cutoff date was established.

On August 15, 1984, Cole filed a second set of interrogatories on Stouts, seventeen in number. Some called for technical information. Stouts informed Cole they wanted to take the deposition of its structural engineer on the project. Cole gave them an evasive and inaccurate (if not knowingly false) address for the engineer, necessitating Stouts' hiring of a skip tracer to find him. On January 8, 1985, Stouts, without benefit of the project engineer's deposition, answered Cole's interrogatories. On January 15, 1985, Cole moved for more complete answers to all but three.

On January 23, 1985, six years into the litigation, Sunrise filed its first set of interrogatories on Stouts.

Stouts made an all-out attempt to obtain outstanding discovery from Cole and Sunrise. On February 6, 1985, they filed a motion to compel responses to old production requests, new production requests, supplemental interrogatories and a motion for an *in camera* inspection of

documents Cole had previously refused to produce. Their expert had told them that he needed certain technical documents, e.g. structural calculations, shop erection drawings, concrete pour documents, to form opinions as to the cause of the steel's collapse.

The court ordered defendants to produce the requested documents and answer the outstanding interrogatories. Cole's counsel represented in open court that he did not have the documents. Counsel for Sunrise likewise told the court that he had never possessed them.

The court also ordered Stouts to file revised answers to five of Cole's interrogatories and to disclose the name of their expert by March 4, 1985. Stouts disclosed their expert on the spot. Within days, counsel for Sunrise telephoned Stouts' expert and informed him that his client's insurance carrier had engaged the expert in another pending case so that the expert had a conflict of interest. Thereupon, the expert withdrew, citing "business reasons." The court gave Stouts an additional two weeks (till March 18, 1985) to find a new expert and file revised answers to Cole's interrogatories. During this time period defendants still did not comply with outstanding discovery requests.

Stouts retained a second expert, but he too needed the requested but not produced documents. By March 18, Stouts located Cole's project engineer in Illinois and subpoenaed him for deposition. The deposition could not be scheduled until March 28. Thus, Stouts were forced to file revised answers without the benefit of their expert's opinions or information gleaned from the project engineer. One of their answers was not complete.

On March 19, 1985, Cole moved to dismiss the complaint claiming, *inter alia*, that "the plaintiffs[']' actions and conduct has or threatens to so delay or obstruct the rights of the Defendant, Cole and Associates,

that the only adequate relief would be dismissal of plaintiff's Complaint." Reciting this language in its order, the court granted the motion that day. The court further ordered Stouts to answer five of Sunrise's twenty-two interrogatories more specifically. Stouts were given until April 1, 1985, to do so.

On March 28, Cole's structural engineer finally appeared for his deposition. Thereat Stouts learned that Cole did possess the disputed and crucial documents as well as an integral yet undisclosed photograph — Cole's counsel had shown them to the engineer two to four weeks earlier, as well as the night before the deposition. Counsel for Sunrise feigned ignorance of the entire matter.

On April 1, 1985, Stouts, still not having obtained these documents, attempted to comply with the court's order. They filed revised answers. On April 2, Sunrise moved to dismiss. At the hearing on the motion, counsel for Sunrise acknowledged that he already possessed the sought after answers to his interrogatories, from Stouts' deposition. He only wanted the answers in interrogatory form to set up a motion for summary judgment. The court granted Sunrise's motion that very day. Indeed, the order entered was identical to the one entered in favor of Cole.

The next day, one of Sunrise's attorneys suffered a pang of conscience. He telephoned Stouts' counsel and disclosed that on March 22 he had obtained copies of the relevant documents from Cole's attorney and that they were in the trunk of his car during the deposition of Cole's project engineer.

The federal question was first fully presented in the Appellate Court by Stouts' Petition for Rehearing.

REASONS FOR GRANTING THE WRIT

I.

DISMISSAL OF STOUTS' COMPLAINT AS A SANCTION FOR NONCOMPLIANCE WITH PRETRIAL DISCOVERY REQUESTS DEPRIVED THEM OF DUE PROCESS; DEFENDANTS WERE NOT PREJUDICED BY STOUTS' ACTS; DEFENDANTS OBSTRUCTED JUSTICE; THE TRIAL COURT NEVER FOUND THAT STOUTS' FAILURE WAS WILLFUL OR IN BAD FAITH; AND STOUTS' COMPLIANCE WAS SUFFICIENT.

In *Societe Internationale v. Rogers,* 357 U.S. 197, 212 (1958), this Court held that Fed. Rule Civ. Proc. 37, which is identical to Indiana Trial Rule 37,

> should not be construed to authorize dismissal of [a] complaint because of a petitioner's noncompliance with a pretrial order when it has been established that failure to comply has been due to inability, and not to any willfulness, bad faith, or any fault of petitioner.

This Court followed this holding in *National Hockey League v. Metropolitan Hockey Club, Inc.,* 427 U.S. 639 (1976), where it reinstated a dismissal of an antitrust action based on the District Court's comprehensive memorandum order, which provided that plaintiffs' failure to timely answer written interrogatories demonstrated "callous disregard of responsibilities counsel owe to the Court and to their opponents" and "flagrant bad faith." On the teaching the of above cases, the dismissal of Stouts' complaint violated basic due process guarantees.

A. Defendants Were Not Prejudiced By Stouts' Conduct.

The trial court never found that Stouts' conduct exhibited willfulness or bad faith. Or that petitioners themselves had any fault in the matter. Simply stated, the trial court never attributed any motive to Stouts' conduct. It found only that defendants' rights had been threatened or delayed. In this regard, the trial court was plainly wrong and its order was an abuse of discretion which deprived Stouts of due process of law.

Defendants already possessed all the information they were seeking through their discovery requests. Counsel for Cole had certified that it was ready for trial years before, in November of 1981. Moreover, Cole had the requested information from Stout's deposition, where he had answered over 1100 questions; Stouts' responses to Cole's first set of interrogatories; Stouts's employer's deposition; and the document deposition of Stout's employer's workers' compensation carrier. Counsel for Sunrise conceded it had the information it sought from Stout's deposition.

Where the information sought in discovery had already been provided, the failure to provide it a *second* time should never have supplied a basis for dismissal. Lesser sanctions were called for. See *Ingalls Shipbuilding Inc. v. United States,* (Fed. Cir., No. 88-1204, September 29, 1988) (It was not unreasonable for plaintiffs to believe that defendant had previously "obtained the bulk of the relevant evidence" so that there was no real prejudice to defendant).

B. Defendants Orchestrated Stouts' Inability to Comply With the Court's Orders.

Stouts have not been able to find a single reported case where a complaint has been dismissed for violation of a discovery order when there was evidence that defendant's tactics amounted to obstruction of justice. Generally, in other cases, the defendant has clean hands. Or, at the very worst, both parties have displayed dilatory tactics. *See e.g. E.E.O.C. v. Carter Carburetor, Div. of ACF Industries,* 577 F.2d 43 (8th Cir. 1978), *cert. denied sub nom. ACF Industries, Inc. Carter Carburetor Division, v. E.E.O.C.,* 439 U.S. 1081 (1979).[2]

Here, on the other hand, defendants repeatedly thwarted Stouts' attempts to obtain necessary information through discovery. Cole falsely denied that it had employed an engineer on the project; Cole falsely represented to the trial court and to plaintiffs' counsel that it did not have the documents sought and needed by plaintiffs in order to answer Cole's interrogatories. And Cole withheld from plaintiffs a crucial and incriminating photograph in response to a production request.

Counsel for Sunrise, immediately upon learning the name of plaintiffs' expert, contacted him and strongly suggested he would lose future work from Sunrise's insurance carrier if he continued as plaintiffs' expert. The Indiana Court of Appeals characterized this as "questionable conduct." It was not. It was pure obstruction of justice.

---

[2] In *E.E.O.C. v. Carter,* the fact that both parties had engaged in dilatory tactics was enough to support the reversal of the discovery sanction order.

Equally outrageous, when the deposition of Cole's structural engineer was finally taken, counsel for Sunrise, the only remaining defendant, conveniently "forgot" that the missing documents (subpoenaed for the deposition) were in the trunk of his car, even though both he and Cole's former counsel (who appeared at the deposition as the *witness's* lawyer), had gone over the documents with the witness the night before.

The Indiana Court of Appeals further adopted different standards for Stouts than for defendants with respect to compliance with discovery orders. The opinion makes only a fleeting reference to the early discovery and avoids totally the fact that defendants took more than a year to answer Stouts' interrogatories. And the Court does not even address the refusal by Cole and Sunrise to obey the trial court's orders to comply with Stouts' document production requests, including an order on Cole to produce the disputed documents for an *in-camera* inspection. How could a party or its counsel be more contemptuous? The Court of Appeals also passed over the fact that Sunrise did not even file a set of interrogatories until January, 1985, six years into the litigation — and that Cole's first set was not filed until 1982.[3]

It was a violation of due process guarantees on such a record to reward the defendants with the dismissal of Stouts' complaint.

What the Indiana Court of Appeals opinion does is justify an abuse of the civil justice system by defendants. It condones such gross abuse of the judicial process as the hiding of photographs and other crucial documents. It cloaks with judicial approval intimidating of critical witnesses by parties or their counsel. It sanctions false

---

[3] The trial court did not consider these matters at all.

answers to interrogatories and winks at a lawyer's misrepresenting to a *court* and opposing counsel, his knowledge or possession of documents forming the subject matter of crucial discovery. In this setting, it was perverse to hold Stouts guilty of contumacious conduct and reward defendants with a bonus for misconduct that, by comparison, dwarfs any purported defects in Stouts' interrogatory answers to insignificance.

C. The Trial Court Never Found That Stouts Acted Willfully Or In Bad Faith.

It was the Indiana Court of Appeals that took it upon itself to make a finding that Stouts' conduct was willful. However, as this Court held in *National Hockey League,* that was improper: "The question, of course, is not whether this Court, or whether the [Indiana] Court of Appeals, would as an original matter, have dismissed the action; it is whether the [Superior] Court abused its discretion in so doing." 427 U.S. at 642. Moreover, where the sanction of dismissal was at issue, the trial court's discretion was not unfettered. It had to be considered within constitutional limitations. *Societe International v. Rogers, supra.* See also, *Ingalls Shipbuilding Inc. v. United States,* (Fed.Cir., No. 88-1203, September 29, 1988).

No sanction had ever been imposed against Stouts prior to the dismissal of Cole. Accordingly, a lesser sanction should have been attempted. To clear this hurdle, the Indiana Court of Appeals proclaimed that the dismissal of Central Rent-A-Crane, three years earlier, constituted the first sanction against Stouts. And, standing on that illegitimate stepping stone, reached the further erroneous conclusion that a "lesser sanction would have been fruitless."

The dismissal of Central was not properly considered. The trial court never considered it. Stouts did not, and

had no reason to, contest the dismissal of Central. Their theory of Central's liability evaporated during discovery. Stout admitted in his deposition that the crane operator had not bumped the steel or done anything to cause the structure to fall. Statements taken of Stout's co-workers also established that the crane and its operator were not involved. Moreover, Stout's employer testified that the crane operator was Stout's co-employee; he was on C & C's payroll, not Central's, at the time of the accident.[4]

D. Stouts' Revised Answers to Defendants' Interrogatories Were Sufficiently Specific

In any case, while the revised answers to defendants' handful of interrogatories may have been inartfully drafted, stripped of surplusage they provided all the information defendants requested—certainly all they could have provided under the circumstances. This is especially true when considered in light of the other completed discovery, e.g. Stout's lengthy deposition and the exhibits attached to the workers' compensation carrier's document deposition, which defendants already possessed. On such a record, dismissal of Stouts' complaint violated due process.

Cole & Associates

1. Stouts were asked to state their contentions of Cole's negligence. They listed nineteen specific acts of negligence. The trial court conceded the sufficiency of this answer.

2. Stouts were asked to cite statutory violations. This was not feasable without expert assistance. And

---

[4] Concededly, Stouts did file a motion to vacate the dismissal order, but they never acted on it. Instead, they moved to withdraw it. This was granted.

where Stouts' first expert was chased off the case and defendants never turned over essential documents for Stouts' second expert's examination, a specific answer here was impossible.

3. Stouts were asked to describe the documents in support of their claim. They listed all that they had in detail, including plans, progress photographs (supplied by Cole), post-accident photographs, a soil report, Cole's specifications for the structure, Cole's daily inspection reports and materials provided by C & C. Cole also already possessed the written statements of Stout's co-workers.

4. Stouts were asked if they were claiming Cole had notice of the negligence. This interrogatory was out of place—obviously taken from a stock set of "notice" interrogatories in a premise and/or municipal liability case.

5. Stouts were asked to detail any mechanical or structural failure connected with the accident. They referred Cole back to their answer to the contention interrogatory. Six of the nineteen specific contentions covered mechanical or structural failure. Additionally, and as Stout had previously testified at his deposition, his general foreman told him after the accident that the anchor bolts were too short for the job.

A. M. Sunrise

1. Stouts were asked to detail any statutory violations. As with Cole, this interrogatory was not susceptible of answer without the documents defendants secreted.

2. Stouts were asked whether all Stout's direction and supervision on the day of the accident came from his employer. Stouts answered "no." This alone was sufficient. But Stouts went further. They stated that Sunrise assumed general responsibility for providing and

inspecting materials, and that Sunrise specifically directed Stout's crew to the work site on the date of the accident with full knowledge that the soil and concrete conditions were unsafe.

3. Stouts were asked whether he was working with anyone but co-employees at the time of the accident. They stated that Stout's employer rented the crane and its operator from Central. Concededly, this answer was clumsy. But it was not in bad faith.

4. Stouts were asked to list the names and addresses of any persons, other than co-employees, with whom Stout was working. They listed Central Rent-A-Crane. Again, clumsy, but not in bad faith.

5. Stouts were asked whether the person giving signals for the movement of the crane was a C & C employee. They answered that no one was signaling the crane operator at the time of the accident. This answer was consistent with Stout's deposition testimony.

In sum and short, dismissal of this case as a sanction for noncompliance with pretrial discovery orders violated Stouts' due process guarantees. The dismissal was inconsistent with the principles advanced in *National Hockey League v. Metropolitan Hockey Club, Inc.*, 427 U.S. 639 (1976), where this Court reinstated a dismissal of a cause of action. There, defendant had no responsibility for plaintiff's noncompliance with pretrial requests and the District Court issued a "comprehensive memorandum . . . supporting its order of dismissal." *Id.* at 642. Further, in *National Hockey League,* plaintiffs never contended that defendants actually possessed the sought after discovery. Or that their responses to interrogatories were sufficiently specific. Here, on the other hand, the trial court never supported its orders with any memorandum opinion; it never found bad faith, explained the prejudice to defendants or considered lesser sanctions.

Moreover, defendants here already possessed the discovery they were seeking and they affirmatively kept Stouts from gaining meaningful technical assistance. In such a case, where the Stouts' were personally innocent of any wrongdoing, dismissal of their cause of action violated their due process rights.

II.

DISMISSAL OF STOUTS' COMPLAINT AS A SANCTION FOR NONCOMPLIANCE WITH PRETRIAL DISCOVERY REQUESTS VIOLATED THEIR DUE PROCESS GUARANTEES WHERE THEY WERE PERSONALLY INNOCENT OF ANY WRONGDOING.

The Stouts were further denied due process where their complaint was dismissed as a first sanction for their lawyers' inability to comply with the trial court's discovery orders, even though they themselves were innocent of any wrongdoing.

Dismissal as a first sanction should *never* be imposed upon an innocent client because it is never just. It denies the client his day in court in violation of due process guarantees. U.S. CONST. Amend XIV. And it is unnecessary because the attorney is personally subject to contempt and to disciplinary action for discovery abuse. *Lolatchy v. Arthur Murray, Inc.*, 816 F.2d 951, 953. (4th Cir. 1987) ("Justice demands that a blameless party not be disadvantaged by the errors or neglect of his attorney which causes a final, involuntary termination of the proceedings.")

We realize that the right of trial by jury is not absolute; that cases may be dismissed for procedural reasons, *i.e* summary judgment, and, certainly for contempt of court. However, federal policy is that cases ought to be decided on the merits. *Societe Internationale*

v. Rogers, 357 U.S. 197 (1958). Thus, while negligence of the attorney may generally be imputed to the client, the trial court should have tempered this rule under the facts and circumstances of this case. Dismissal was too harsh a sanction. It amounted to a denial of due process.

CONCLUSION

Our constitutional guarantee of due process is so strong that summary dismissal, as occurred in this case, for alleged prejudice foisted by plaintiffs' on defendants, as the trial court ruled — and affirmed by the Indiana Court of Appeals on the different ground that the Stouts, throughout the history of the litigation were contumacious toward the court — is so devoid of support in the record, that the Stouts in this case were denied due process of law. U.S. CONST., Amend XIV. And in this setting the Stouts' right to trial by jury was violated. U.S. CONST., Amend VII. Otherwise, we submit, these guarantees mean nothing. A case could be dismissed for reasons that no reasonable mind would agree with — and a party could be denied all the rights a free society feeds on. This is stark injustice.

Wherefore, Petitioners Joseph Stout and Barbara Stout pray that a writ of certiorari issue to the Supreme Court of Indiana and the Indiana Court of Appeals to review the decision of the Indiana Court of Appeals and the decision of the Supreme Court of Indiana refusing to accept transfer.

Respectfully submitted,

LEONARD M. RING AND ASSOCIATES, P.C.
111 West Washington Street
Chicago, Illinois 60602
(312) 332-1765

YOUNG & YOUNG
118 North Delaware Street
Indianapolis, Indiana 46204
(317) 639-5161
Attorneys for Petitioner

Of Counsel:
LEONARD M. RING*
HOWARD S. YOUNG, JR.
**Attorney of Record*

APPENDICES

IN THE PORTER SUPERIOR COURT
SITTING AT VALPARAISO, INDIANA

STATE OF INDIANA **SS:**
COUNTY OF PORTER

JOSEPH STOUT and
BARBARA STOUT,
Plaintiffs

vs.

A.M. SUNRISE CONSTRUCTION COMPANY, COLE and ASSOCIATES, and CENTRAL RENT-A-CRANE, INC.
Defendants

CAUSE NO:
79-PSC-3321

FILED
IN OPEN COURT
MAR 19, 1985
/s/ ROGER V. BRADFORD
JUDGE PORTER
SUPERIOR COURT

ORDER OF DISMISSAL

This cause comes before the Court on Defendant, Cole and Associates, Motion for Sanctions and Motion for Dismissal.

The Court being duly advised hereby finds that Plaintiffs' conduct has or threatens to so delay or obstruct the rights of the Defendant, Cole and Associates, that the only adequate relief would be dismissal of Plaintiffs' Complaint.

IT IS THEREFORE ORDERED, ADJUDGED AND DECREED BY THIS COURT that Plaintiffs' Complaint against the Defendant, Cole and Associates, is hereby dismissed with prejudice.

IT IS FURTHER ORDERED, ADJUDGED AND DECREED BY THIS COURT that there is no just reason for delay, and that this is a final appealable Order.

/s/ ROGER V. BRADFORD
JUDGE, PORTER SUPERIOR COURT

IN THE PORTER SUPERIOR COURT
SITTING AT VALPARAISO, INDIANA

JOSEPH STOUT and
BARBARA STOUT,
Plaintiffs

vs.

A.M. SUNRISE CONSTRUCTION COMPANY, COLE and ASSOCIATES, and CENTRAL RENT-A-CRANE, INC.,
Defendants

CAUSE NO:
79-PSC-3321

FILED
IN OPEN COURT
APR 2, 1985
/s/ ROGER V. BRADFORD
JUDGE PORTER
SUPERIOR COURT

ORDER OF DISMISSAL

This cause comes before the Court on Defendant, A.M. Sunrise Construction Company's Motion for Dismissal.

The Court being duly advised hereby finds that plaintiffs' conduct has or threatens to so delay or obstruct the rights of the defendant, A.M. Sunrise Construction Company, that the only adequate relief would be dismissal of plaintiffs' Complaint.

IT IS THEREFORE ORDERED, ADJUDGED AND DECREED by this Court that plaintiffs' Complaint against the defendant, A.M. Sunrise Construction Company, is hereby dismissed with prejudice.

IT IS FURTHER ORDERED, ADJUDGED AND DECREED by this Court that there is no just reason for delay, and that this is a final appealable Order.

/s/ ROGER V. BRADFORD
JUDGE, PORTER SUPERIOR COURT

Joseph STOUT and Barbara Stout,
Appellants (Plaintiffs Below),

v.

A.M. SUNRISE CONSTRUCTION COMPANY, INC.,
and COLE & ASSOCIATES, INC.,
Appellees (Defendants Below).

Joseph STOUT and Barbara Stout,
Appellants (Plaintiffs Below),

v.

C & C IRON, INC. and Biblich Elementary
School, Appellees (Parties pursuant to
T.R. 34(C) for discovery purposes
Below).

No. 65A04-8603-CV-70.

Court of Appeals of Indiana,
Fourth District.

March 30, 1987.

Rehearing Denied May 26, 1987.

YOUNG, Judge.

On March 19, 1985, Joseph and Barbara Stouts' action against Cole & Associates was dismissed because of the Stouts' failure to adequately respond to Cole & Associates' requests for discovery. On April 2, 1985, the Stouts' action against A.M. Sunrise Construction Co., Inc. was dismissed for similar reasons. The Stouts appeal both of these dismissals. One issue is raised on appeal:

> Whether the trial court abused its discretion by dismissing the complaints of Joseph and Barbara Stout against Cole & Associates and A.M. Sunrise Construction Co., as a sanction for the Stouts' failure to comply with the trial court's discovery orders.

We affirm.

On October 3, 1977, Joseph Stout, a construction worker, fell from a beam while trying to secure the beam to a steel column. As a result of injuries suffered in the fall, Stout was rendered a paraplegic. On October 3, 1979, Stout filed an action against A.M. Sunrise, Cole & Associates, and Central Rent-A-Crane, Inc. seeking damages for the injuries suffered in the fall. His wife, Barbara Stout, sought damages for loss of consortium.[1]

Following the instigation of the action, numerous discovery motions were filed between the plaintiff and defendants, between the defendants and other third parties, and between the various defendants. We will limit our discussion to the motions and events necessary to our opinion.

On March 2, 1982, Central Crane filed a supplemental set of interrogatories on the Stouts. On May 26, 1982, Central Crane filed a motion for sanctions or in the alternative to compel discovery on the Stouts in order to obtain answers to those interrogatories. On June 11, 1982, Central Crane filed a motion asking the trial court to either set the matter for hearing or give Central Crane a summary ruling because of the Stouts' failure to respond. On September 29, 1982, the trial court ordered the Stouts to make substantive responses to Central Crane's interrogatories within twenty days or suffer dismissal of their claims against Central Crane. On October 21, 1982, Central Crane filed its Motion to Dismiss. The trial court granted Central Crane's motion and dismissed with prejudice the complaints of Joseph and Barbara Stout against Central Crane for their failure

---

[1] C & C Iron, Inc. was subsequently brought into the action by way of an indemnity claim filed by A.M. Sunrise. Although C & C Iron filed a brief in this appeal, it is not directly involved and, therefore, is not discussed in this opinion.

to respond to the discovery requests. Central Crane's dismissal is not a subject of this appeal.

During this same time period, Cole & Associates also sought discovery from the Stouts. On May 21, 1982, Cole & Associates filed ten interrogatories on the Stouts and requested the trial court to order the Stouts to respond within thirty days. The trial court entered the order; however, the Stouts filed no answers. On September 20, 1982, Cole & Associates filed a motion for sanctions or alternatively requested the trial court to compel answers to the interrogatories propounded to the Stouts. Our review of the record fails to disclose any order entered on this motion. Following these motions and the dismissal of Central Crane, there appears to have been no further action in the case until March of 1984.

On May 22, 1984, Cole & Associates filed a motion for sanctions with respect to the interrogatories it had filed on the Stouts on May 21, 1982. The trial court ordered the Stouts to respond by June 13, 1984 or suffer sanctions. On June 11, 1984, new counsel appeared for the Stouts and requested an additional twenty days to respond to Cole & Associates' discovery requests. On June 24, 1984, the Stouts still had not filed answers to the interrogatories and were ordered to do so within fifteen days. Answers were filed on August 8, 1984.

On August 15, 1984, Cole & Associates filed an additional set of seventeen interrogatories on the Stouts and requested the trial court to order the Stouts to respond within thirty days. The court entered the order. On September 11, 1984, the Stouts requested and received an additional thirty days to respond. On December 14, 1984, having received no answers, Cole Associates filed a motion to compel. The Stouts were ordered to respond within fifteen days or suffer sanctions. On January 2, 1985, the Stouts asked for additional time to respond and were given until January 12, 1985. Their answers were

filed on January 8, 1985.

On January 15, 1985, Cole & Associates filed a motion to compel more complete answers. Cole & Associates had requested information concerning the Stouts' specific contentions, expert witnesses and workers present at the time of the accident. The Stouts' answers to these questions were evasive and non-responsive. On February 22, 1985, the Stouts were ordered to provide responses to five of Cole & Associates' interrogatories and to provide the names and addresses of the Stouts' expert witnesses by March 4, 1985 or suffer dismissal. On March 1, 1985, the Stouts requested an extension of time to respond to the interrogatories on the bases that their expert witness had withdrawn due to a conflict of interest[2] and that they were still seeking certain materials needed to respond to the interrogatories.[3] The trial court granted

---

[2] The Stouts strenuously argued that the withdrawal of their expert was the result of questionable behavior on the part of one of the defendants' attorneys. Defense counsel apparently contacted the Stouts' expert and informed him of a conflict. Defense counsel did not discuss the problem with plaintiffs' counsel prior to contacting the expert.

[3] During this same time period, the Stouts were filing various discovery requests on both defendants and non-parties to obtain information they believed necessary to answer the interrogatories propounded to them. On February 6, 1985, the Stouts had also filed a motion to compel more complete answers to discovery requests that had been filed in May, 1980. The trial court, however, found that any information sought by the Stouts affected only one answer in each of the defendants' requests and did not excuse the Stouts' failure to file specific answers. The Stouts also asserted that the defendants had deliberately withheld the documents in question. We merely note that the issue was hotly contested and fully presented to the trial court. The facts before the trial court support its ultimate conclusion. No abuse of discretion occurred in the trial court's weighing of these factors in determining the sanction to impose on the Stouts.

the Stouts an extension of time up to March 18, 1985 to respond to Cole & Associates' interrogatories. The Stouts filed their answers on that date and Cole & Associates filed a motion to dismiss the next day. The answers filed by the Stouts failed to provide information on their expert witness[4] or to provide specific information on some of the other interrogatories. As a result, the trial court dismissed with prejudice the Stouts' complaint against Cole & Associates on March 19, 1985.

The events leading to the dismissal of the complaints against A.M. Sunrise are similar. A.M. Sunrise filed interrogatories on the Stouts on January 23, 1985. Answers to these interrogatories were filed on March 18, 1985. However answers to several of the interrogatories were evasive and non-responsive. On March 19, 1985, the trial court ordered the Stouts to file more specific answers to five of the twenty-two interrogatories by April 1 or suffer dismissal. Supplemental answers were filed on April 1. On April 2, 1985, A.M. Sunrise moved for dismissal based on the inadequacy of the Stouts' responses. That same day, the trial court dismissed with prejudice the Stouts' complaints against A.M. Sunrise. At the hearing on the motion to dismiss, the trial court stated that it was granting A.M. Sunrise's motion to dismiss because the supplemental answers "add nothing more than the originals did and provide no more specifics. Therefore, the Court's order has not been complied with and the Court is going to grant the order of dismissal." (R.825) At a subsequent hearing on the Stouts' motion

---

[4] The Stouts responded that only one expert had been consulted and he had resigned because of a conflict. However, at a later date, the Stouts' counsel acknowledged that he had contacted and was working with another expert at that time. It is also notable that the Stouts did not meet with an engineering expert until 1985 although the action had been on file since October, 1979. (Affidavit of Kevin K. McQuillan, R. 21)

to set aside the dismissals, the trial court noted that only one interrogatory from each defendant involved documents that the Stouts were attempting to obtain from the defendants and non-parties. The remainder of the questions had nothing to do with documents and could have been answered by the Stouts. Therefore, the trial court denied the Stouts' motion to set aside the dismissals. This appeal followed.

Trial Rule 37 permits trial courts to impose various sanctions upon parties failing to comply with discovery. The sanction may range from an award of expenses to an entry of dismissal or default judgment. *Pitts v. Johnson County Dept. of Public Welfare* (1986), Ind.App., 491 N.E.2d 1013, 1014-15. The sanction to be imposed is left to the sound discretion of the trial court. *Id.* In *Chrysler Corp. v. Reeves* (1980), Ind.App., 404 N.E.2d 1147, 1154, this court stated in a footnote that "the sanction of default or dismissal is never appropriate without entry of a lesser sanction first." We have since modified our approach to the use of the sanction of dismissal for failure to comply with discovery orders. While we still recognize that "the opportunity to be heard is a litigant's most precious right and should be sparingly denied," *id.* at 1153, we will not condone disregard for the trial court's orders. It is therefore now "settled in this jurisdiction that lesser sanctions should be imposed on parties unless there has been contumacious disregard of the court or lesser sanctions have not been effective." *Pitts supra* at 1015.

In the present case, the Stouts evinced a pattern of blatant disregard for the trial court's orders concerning

discovery.[5] They completely failed to respond to court orders compelling them to answer Central Crane's discovery requests in 1982. As a result, their actions against Central Crane were dismissed. Even after suffering this dismissal, the Stouts failed to comply with the court's orders compelling them to file specific responses to Cole & Associates' interrogatories. By the time the Stouts' final answers were due to A.M. Sunrise, they had suffered the dismissal of their complaints against both Central Crane and Cole & Associates. Yet their answers to A.M. Sunrise were still insufficient and failed to provide pertinent information concerning expert witnesses and the factual basis for their claims. At the time the claims against Cole & Associates and A.M. Sunrise were dismissed, the action had been on file for approximately six years and was scheduled to go to trial on July 8, 1985. Yet, the Stouts still could not specifically answer many of the questions because "investigation continues." It is notable that some of the information requested was or should have been within the personal knowledge of Joseph Stout, e.g. who he was working with

---

[5] The Stouts assert that their failure to respond was excusable. First, as previously discussed, they assert that it was due in part to the defendants and third-parties' failure to produce certain documents. Second, also as previously discussed, they point out that they lost their expert witness when defense counsel contacted the witness and informed him of a possible conflict of interest. Third, they assert that the delay was caused in part by Joseph Stout suffering a heart attack during this time period. In addition, the Stouts argue that their new trial counsel had shown a good faith effort to comply with the discovery requests. The Stouts assert that the trial court failed to properly weigh these factors when deciding the sanction to be imposed. We disagree. Our review of the record reveals no abuse of discretion in the trial court's decision that dismissal was an appropriate sanction even when considering all of these events. The trial court's reasons for imposing the sanction of dismissal were well-supported by the facts and circumstances surrounding this case.

the day of the accident. Under these circumstances, we find the sanction of dismissal appropriate. A lesser sanction apparently would have been fruitless considering the Stouts' failure to correct their response patterns even after suffering the dismissal of their claims against Central Crane. Under the facts of this case, the trial court's conclusion that the rights of the defendants had been obstructed was well-founded. We, therefore, affirm the dismissal of the actions against both Cole & Associates, Inc. and A.M. Sunrise Construction Co., Inc.

MILLLR, J., concurs.

SULLIVAN, J., concurs as to dismissal of complaint against Cole & Associates, Inc., but dissents as to dismissal of complaint against A.M. Sunrise Const. Co., Inc.

Supreme Court of Indiana

CLERK OF THE SUPREME COURT,
COURT OF APPEALS AND TAX COURT

DANIEL ROCK HEISER, CLERK
217 STATE HOUSE

INDIANAPOLIS, 46204
TELEPHONE 317-232-1930

LEONARD M. RING
111 WEST WASHINGTON ST.
CHICAGO, IL 60602-0000

Cause Number
64A04-8603-CV-00070
LOWER CAUSE
79-PSC-3321

JOSEPH & BARBARA STOUT -V- A.M. SUNRISE CONST. CO., ET AL

You are hereby notified that the SUPREME COURT has on this day 8/23/88

APPELLANTS' PETITION TO TRANSFER IS HEREBY DENIED. RANDALL T. SHEPARD, CHIEF JUSTICE

ALL JUSTICES CONCUR, EXCEPT DEBRULER & DICKSON, J.J., WHO VOTE TO GRANT TRANSFER.

WITNESS my name and the seal of said Court,

This 23RD day of AUGUST, 1988

/s/ DAN HEISER

Clerk Supreme Court, Court of Appeals and Tax Court

Supreme Court, U.S.
FILED
DEC 15 1988
JOSEPH E. SPANIOL, JR.
CLERK

No. 88-864 (2)

IN THE

Supreme Court of the United States

OCTOBER TERM, 1988

JOSEPH STOUT and BARBARA STOUT,
Petitioners,

v.

A.M. SUNRISE CONSTRUCTION COMPANY, INC., and COLE & ASSOCIATES, INC.,
Respondents.

BRIEF OF A.M. SUNRISE CONSTRUCTION COMPANY, INC. IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

MICHAEL S. BAECHLE*
1000 E. 80th Place
Suite 422, South Tower
Merrillville, IN 46410
Phone: (219) 769-3422

Attorney for Respondent
A.M. Sunrise Construction Company, Inc.

**Attorney of Record*

PRESS OF BYRON S. ADAMS, WASHINGTON, D.C. (202) 347-8203

21 pp

QUESTIONS PRESENTED

1. Why should the Supreme Court of the United States entertain a Petition for a Writ of Certiorari where the issues presented are not novel, but have in fact been decided in numerous decisions of the Supreme Court of the United States?
2. Why should a Petition for a Writ of Certiorari be granted, where the plaintiffs' claims against three separate defendants were dismissed, *seriatim*, for repeated and gross non-compliance with discovery orders of a trial court?
3. Why should a Petition for a Writ of Certiorari be granted where all of the claims presented to this Court as excuses for violation of discovery orders were determined to be *immaterial* by the trial court, the Court of Appeals of Indiana, and the Supreme Court of Indiana?

TABLE OF CONTENTS

	Page
INDIANA STATUTE APPLICABLE	2
STATEMENT OF THE CASE	2
SUMMARY OF ARGUMENT	7
ARGUMENT	8
CONCLUSION	16

TABLE OF AUTHORITIES

CASES:	Page
Breedlove v. Breedlove, 421 N.E.2d 739 (1981)	9
Farinelli v. Campagna, 338 N.E.2d 299 (1975)	9
Fulton v. Van Slyke, 447 N.E.2d 628, (1983)	10
Hammond Packing Co. v. Arkansas, 212 U.S. 322 (1909)	12
Hepp v. Pierce, 460 N.E.2d 186 (1984)	15
Insurance Corporation of Ireland, Ltd. v. Compagnie des Bauxites de Guinee, 456 U.S. 694 (1982)	14
Justak v. Bochnowski, 391 N.E.2d 872 (1979)	9
Link v. Wabash Railroad, 370 U.S. 626 (1962)	15
National Hockey League v. Metropolitan Hockey Club, 427 U.S. 639 (1976)	13
Noble v. Moistner, 388 N.E.2d 620 (1979)	15
Societe Internationale v. Rogers, 357 U.S. 197 (1958)	12

IN THE

Supreme Court of the United States

OCTOBER TERM, 1988

JOSEPH STOUT and BARBARA STOUT,
Petitioners,

v.

A.M. SUNRISE CONSTRUCTION COMPANY, INC., AND COLE & ASSOCIATES, INC.,
Respondents.

BRIEF OF A.M. SUNRISE CONSTRUCTION COMPANY, INC. IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

A.M. Sunrise Construction Company, Inc. (hereafter A.M. Sunrise) respectfully opposes the plaintiffs' Petition for a Writ of Certiorari on the grounds that dismissal of the Complaint against A.M. Sunrise was the third time the sanction of dismissal was imposed upon the plaintiffs, for failure to comply with discovery rules and orders. The standard on review is whether or not the trial court abused its discretion in imposing the sanction of dismissal.

This issue has been reviewed by the Court of Appeals of Indiana, which found that the trial court did not abuse its discretion. The matter was presented *de novo* to the Supreme Court of Indiana, which refused to overrule the Court of Appeals.

Where a sanction has been imposed pursuant to valid statute or rule, no violation of the due process

requirements of the Fourteenth Amendment have occurred.

INDIANA STATUTE AUTHORIZING SANCTIONS

The Indiana Rules of Court, Trial Rule 37(B)(2) provides as follows:

> If a party . . . fails to obey an order to provide or permit discovery . . . the court in which the action is pending may make such orders in regard to the failure as are just, and among others the following:
>
> . . . .
>
> (c) An order . . . dismissing the action or proceeding or any part thereof, or rendering a judgment by default against the disobedient party; . . .

STATEMENT OF THE CASE

On October 3, 1977 Joseph Stout was injured on a construction project. On October 3, 1979 he filed suit against Central Rent-A-Crane, Cole & Associates, A.M. Sunrise Construction Company, Inc., and Biblich Elementary School. A.M. Sunrise subsequently joined C&C Iron as a third-party defendant.

On October 6, 1979, Central Rent-A-Crane propounded Interrogatories to the plaintiffs; on December 6, 1979 Central Rent-A-Crane propounded a Motion for Production of Documents to the plaintiffs. On April 29, 1980, the plaintiffs answered Central Rent-A-Crane's Interrogatories, but did not respond to Central Rent-A-Crane's Motion for Production until

January 26, 1981. In April, 1982, Central Rent-A-Crane filed a Motion to Compel Discovery against the plaintiffs, and on June 11, 1982, filed a Motion for Summary Ruling on a Motion for Sanctions. On September 29, 1982, the Court ordered the plaintiffs to respond to Central Rent-A-Crane's Interrogatories without objections, or to suffer dismissal with prejudice. The plaintiffs having failed to comply with that Order, on October 21, 1982, the Court dismissed the plaintiffs' Complaint against Central Rent-A-Crane for non-compliance with discovery orders. The plaintiffs resisted that Motion, filing their Motion to Reinstate the Claim on November 3, 1982; that Motion was subsequently withdrawn on March 7, 1984. *The dismissal of the Complaint against Central Rent-A-Crane represented the first time that sanctions were imposed against the plaintiffs for non-compliance with discovery orders.*

In May of 1982, Cole & Associates filed Interrogatories to the plaintiff. On September 20, 1982 Cole & Associates filed a Motion to Compel Discovery against the plaintiffs. On May 22, 1984 Cole & Associates filed a Motion for Sanctions on account of the plaintiffs' failure to respond to Interrogatories filed in May of 1982. The Court ordered the plaintiffs to answer the Interrogatories by June 13, 1984 or to suffer sanctions. On June 11, 1984 the plaintiffs moved for an extension of twenty (20) days to respond to these Interrogatories. The plaintiff did not comply with the extension deadline, but did file answers to the Interrogatories on August 8, 1984; answers were evasive or non-responsive. On August 15, 1984 Cole & Associates filed additional Interrogatories to the plaintiffs, to which the Court ordered answers within

thirty (30) days. On September 11, 1984 the plaintiffs requested thirty (30) additional days to respond to Cole's Interrogatories. On December 14, 1984 Cole & Associates filed a Motion to Compel answers to the Interrogatories, and the Court ordered the plaintiffs to answer within fifteen (15) days or suffer sanctions by the Court. On January 8, 1985 the plaintiffs filed non-responsive answers to Cole's Interrogatories. On January 15, 1985 Cole & Associates filed another Motion to Compel the plaintiffs to respond to the Interrogatories. On February 6, 1985 the plaintiffs requested an extension of time to respond to Interrogatories propounded by Cole & Associates. On February 21, 1985 the Court ordered the plaintiffs to respond to Cole's Interrogatories more specifically on or before March 4, 1985 or to suffer dismissal with prejudice without further hearing. On March 1, 1985 the plaintiffs filed a Request for Extension of Time to respond to those Interrogatories. The Court granted the plaintiffs until March 18, 1985 to answer the Interrogatories, and stated that no further extensions of time would be granted. On March 19, 1985 hearing was held on Cole & Associates' Motion for Sanctions and Motion to Dismiss. The Court found that the plaintiffs' conduct had threatened to or had so delayed the right of Cole & Associates to prepare a defense that the only adequate relief would be dismissal with prejudice. *This represented the second time the plaintiffs' case against a defendant was dismissed as a sanction.*

On January 23, 1985 A.M. Sunrise filed Interrogatories directed to the plaintiffs, and the plaintiffs were ordered to answer within thirty (30) days. On February 6, 1985 the plaintiffs filed a Request for

Extension of Time to respond to these Interrogatories. On March 1, 1985 the plaintiffs requested another extension of time to respond to these Interrogatories. The Court granted the plaintiffs until March 18, 1985 to answer these Interrogatories and stated that no further extensions of time would be granted. On March 18, 1985 the plaintiffs filed Answers to the Interrogatories propounded by A.M. Sunrise; the answers were evasive and non-responsive. On March 19, 1985 the Court ordered the plaintiffs to respond more specifically to five (5) Interrogatories propounded by A.M. Sunrise, and instructed the plaintiffs to file these answers not later than April 1, 1985, or to suffer dismissal with prejudice without further hearing.

On February 5, 1985, more than five (5) years after the litigation commenced, plaintiffs' counsel first contacted and attempted to retain an expert named Al Gouwens. Mr. Gouwens declined employment by plaintiffs' counsel in the Stout case, because he was already retained as an expert in a series of cases wherein he was the expert for the defendants, and Leonard Ring (plaintiffs' counsel in the Stout case) was plaintiffs' counsel in those various suits. On March 1, 1985 the plaintiffs requested production of documents from C&C Iron which their expert allegedly needed in order to form an opinion. On March 8, 1985 they retained another expert, named Ken Milbrandt. On March 20, 1985 the plaintiffs' counsel were advised by the attorney for C&C Iron that he had gathered the documents requested, and that the documents were available for inspection and photocopying by the plaintiffs' counsel. *Notwithstanding that the deposition of a structural engineer for Cole & Associates was set*

for March 28, 1985, plaintiffs' counsel made no effort to obtain those documents from C&C Iron. Notwithstanding that plaintiffs were under an Order to more specifically respond to Interrogatories propounded by A.M. Sunrise, one of which ostensibly required expert opinion to complete, the plaintiffs' counsel made no effort to take possession of the documents from C&C Iron, and again filed non-responsive answers to Interrogatories propounded by A.M. Sunrise. A hearing was held on April 2, 1985, and the Court determined that the Interrogatory Answers by A.M. Sunrise added nothing more than the original Answers, and that the Answers were not in compliance with the Court's Order. Accordingly, the trial court dismissed the Complaint as to A.M. Sunrise, leaving Biblich Elementary School as the only defendant.

The dismissal of A.M. Sunrise was the third time dismissal was imposed as a sanction for non-compliance with court orders.

Subsequently, three (3) hearings were held before the trial court in an endeavor by the plaintiffs to set aside the dismissal as to Cole & Associates and A.M. Sunrise. Arguments were made that documents were needed for experts to render opinions in order to answer the Interrogatories. *The Court specifically stated that this was true of only one Interrogatory pertaining to A.M. Sunrise, and that there was no excuse for the failure to respond to the others.* The Court declined to set aside the dismissal. The case was appealed by the plaintiffs to the Indiana Court of Appeals, which affirmed the trial court. The plaintiffs petitioned for a rehearing by the Court of Appeals of Indiana, which was denied. The plaintiffs

filed a Petition for Transfer to the Supreme Court of Indiana. The Supreme Court of Indiana directed the parties to file Briefs and to appear before the Court to argue the matter *de novo*. Subsequently, the Supreme Court of Indiana refused to grant transfer.

SUMMARY OF ARGUMENT

The plaintiffs' Complaint against A.M. Sunrise was dismissed a a *third* sanction for repeated failure to comply with discovery rules and orders. This dismissal was under the authority of Indiana Rules of Trial Procedure Number 37(B), which is similar to Federal Rule of Civil Procedure Number 37(b).

Under Indiana law, the choice of sanctions is discretionary. The trial court is authorized to make its determination of the appropriate sanction based upon its review of the entire record and the entire course of conduct of a party against whom sanctions are being sought. The Indiana Court of Appeals will not re-weigh the evidence for or against the sanction selected by the trial court. The only question on appeal is whether or not the trial court abused its discretion. An abuse of discretion under Indiana law is an exercise of discretion which is inconsistent with the logic and the facts.

The entire record in this case shows that the plaintiffs were dilatory throughout this litigation. They waited until the very last day for the statute of limitations to run before filing their suit, and thereafter, were repeatedly dilatory in compliance with discovery and Court Orders compelling discovery. In repeated instances they sought extensions of time to comply with discovery, and then failed to comply with dis-

covery orders. They did not seek an expert until almost five and one-half ($5^1/_2$) years after the commencement of the litigation and five (5) months before the discovery cut-off. They did not take possession of documents which they claimed their experts needed in order to form an opinion and to respond to discovery. In post-dismissal motions, the plaintiffs did not argue that documents were "hidden" or "justice obstructed," nor did they raise this issue in their first Appellate Brief. Only as they proceeded unsuccessfully through the various stages of appeal in the Indiana Courts did the plaintiffs refine their argument to develop a theory that documents were hidden and that justice was obstructed.

Now the plaintiffs contend that the dismissal violated their constitutional rights under the Fourteenth Amendment.

However, numerous decisions of the Supreme Court of the United States have established that the sanction of dismissal or default is appropriate under Federal Rule of Civil Procedure Number 37 or any comparable state statute, and that due process is not thereby violated. The Supreme Court of the United States has also held that it is immaterial whether the circumstances leading to the sanction of dismissal were the fault of the attorney or of the party himself.

There is no basis whatever for this case to be submitted to the Supreme Court of the United States, and the Petition for a Writ of Certiorari should be denied.

ARGUMENT

A review of the entire record in this case will readily disclose that the plaintiffs were guilty of repeated

violations of discovery deadlines and orders. Ultimately, with trial being a matter of about 3 months away, the trial court simply concluded that A.M. Sunrise was being deprived of its opportunity to prepare a defense as a result of the plaintiffs' dilatoriness and non-compliance with Court Orders.

In making a determination of appropriate sanctions, the trial court may consider the entire record of facts and circumstances surrounding the particular case. *Farinelli v. Campagna*, (1975), ___Ind.App. ___ , 338 N.E.2d 299.

The plaintiffs' strenuously argue that it was a violation of their rights of due process to dismiss their claim against Cole & Associates and A.M. Sunrise as a "first" sanction. They contend that a lesser sanction should have been employed. However, the record will disclose that the dismissal of Cole & Associates was the *second* time the sanction of dismissal had been employed, and that the dismissal of A.M. Sunrise represented the *third* time that the court granted dismissal as a sanction. The trial court could have well concluded that having dismissed the plaintiffs' claims against two defendants, lesser sanctions would not persuade the plaintiffs to comply with discovery orders.

The choice of the sanction for failure to comply with the discovery order is within the discretion of the trial court. *Breedlove v. Breedlove*, (1981), ___ Ind.App. ___ , 421 N.E.2d 739. The Court of Appeals of Indiana will interfere with the trial court's exercise of discretion only upon a showing that the trial court abused its discretion. *Justak v. Bochnowski*, (1979), ___ , 391 N.E.2d 872. The Court of Appeals may say that the trial court has abused its discretion only

when the result reached by the trial court is "clearly against the logic and effect of the facts and circumstances which are before the trial court" and the reasonable, probable, and actual deductions flowing therefrom. *Fulton v. Van Slyke*, (1983), ___Ind.App. ___, 447 N.E.2d 628.

A review of every one of the foregoing Indiana cases will show that in each of those cases, the conduct of the plaintiff was less egregious than the conduct of the plaintiffs in the present case. Dismissal of the plaintiffs' claim against A.M. Sunrise was well within the bounds of the controlling case law of Indiana. On Appellate review, the Court of Appeals of Indiana held that the trial court had not abused its discretion. The Supreme Court of Indiana, which heard oral argument on the allegations now presented to the Supreme Court of the United States, agreed.

The plaintiffs contend that their failure to respond to discovery by A.M. Sunrise was caused by their inability to obtain expert opinion. They also contend that the expert needed certain documents in order to form an opinion. *The plaintiffs had in fact retained their second expert, and had requested production of the documents in question from C&C Iron, but when the documents were made available by C&C Iron, the plaintiffs' counsel neglected to take possession of the documents.* Either the documents were not truly necessary, or the plaintiffs' counsel were guilty of neglect. Knowing that they were required to file true and complete amended answers to five (5) of A.M. Sunrise's Interrogatories not later than April 1, 1985,and knowing that they would be subject to dismissal without further hearing if they did not comply

with the Court's Order to do so, they nonetheless failed to obtain the documents and submit the documents to their expert.

In any event, the trial court stated that its reason for dismissing the Complaint against A.M. Sunrise was based upon the failure to answer four (4) Interrogatories, the answers to which did not require either expert opinion or documents.

The plaintiffs also contend, as they did before the Court of Appeals of Indiana and before the Supreme Court of Indiana, that since they had already submitted Joseph Stout to a deposition there was no need for them to respond to the Interrogatories, notwithstanding the Court Order. The deposition of Joseph Stout was given in 1981. The Interrogatories were filed in 1985, 46 months later. It would be reasonable to assume that the plaintiffs and their attorneys would have acquired additional information in the intervening time, and defense counsel would be derelict in failing to inquire as to whether or not any additional information had been obtained. In any event, it is not within the purview of a party to ignore a court order to comply with discovery, regardless of whether or not the party himself considers the discovery to be necessary. Once the court determines that the discovery is necessary, the party has no choice but to comply, or to suffer sanctions.

The plaintiffs now contend that the imposition of sanctions under Indiana Trial Rule 37 were violative of their Fourteenth Amendment due process rights. Federal Rule of Civil Procedure Number 37(b) is substantially similar to Indiana Rule of Trial Procedure Number 37(B). Both allow the imposition of sanctions,

including dismissal or default, for failure to comply with discovery orders.

In *Hammond Packing Co. v. Arkansas*, 212 U.S. 322 (1909), the Supreme Court of the United States addressed a case wherein a state trial court had stricken the answer of a defendant corporation which had failed to produce material evidence. The authority of the trial court to strike the answer was found in a state statute requiring corporations to produce documents and creating a presumption of fact as to bad faith and untruth of a defense in the event of suppression of material evidence. The Supreme Court held that the statute did not deny due process of law. The Supreme Court further held that the court's order striking the defense did not deny due process.

In *Societe Internationale v. Rogers*, 357 U.S. 197 (1958), the plaintiff was requested to produce records which, by Swiss law, the plaintiff was prohibited from producing. The plaintiff made a good faith effort to comply with court orders concerning discovery, and indeed made production of 190,000 documents. However, because the production of some of the requested documents would have subjected the plaintiff to prosecution under Swiss law, the plaintiff did not produce those documents. As a result, the district court dismissed the Complaint under Rule 41(b), even though the court found that the plaintiff had attempted in good faith to produce the documents.

The Supreme Court held that dismissals for failure to comply with discovery orders were governed by Federal Rules of Civil Procedure Number 37(b), not by Federal Rules of Civil Procedure Number 41(b). The Court noted that the words "refusal" and "failure" to obey discovery orders have the same meaning.

and that under FRCP 37(b), a court could default a party for failure to comply with discovery consistent with the Due Process Clause of the Fourteenth Amendment, citing *Hammond Packing Company v. Arkansas*, supra.

In *National Hockey League v. Metropolitan Hockey Club*, 427 U.S. 639 (1976), the Supreme Court of the United States held that a District Court did not abuse its discretion in resorting to the extreme sanction of dismissing the respondent's anti-trust action against the petitioners pursuant to FRCP 37, where the Court found that notwithstanding its admonitions and numerous extensions of time, the respondents failed to respond to written Interrogatories as ordered by the court.

The Supreme Court of the United States stated:

> The question of course is not whether this Court or whether the Court of Appeals would as an original matter have dismissed the action. *It is whether the District Court abused its discretion in so doing.*
> But here, as in other areas of the law, the most severe in the spectrum of sanctions provided by statute or rule must be available to the District Court in appropriate cases, not merely to penalize those whose conduct may be deemed to warrant such a sanction, but to deter those who might be tempted to such conduct in the absence of such a deterrent . . . (*Id.* at 642,643) (emphasis added)

In another case, the Supreme Court upheld the use of FRCP 37(b) to foreclose a jurisdictional defense. In that case, the defendants had pleaded lack of ju-

risdiction over the person. The plaintiff submitted discovery to the defendants in order to try to establish facts to show whether or not jurisdiction indeed existed. The defendants failed to comply with discovery orders. Under the authority granted by FRCP 37(b), the District Court held that jurisdiction was established. *Insurance Corporation of Ireland, Ltd. v. Compagnie des Bauxites de Guinee*, 456 U.S. 694 (1982). In that case, the Supreme Court made the following comments:

> The expression of legal rights is often subject to certain procedural rules. The failure to follow those rules may well result in a curtailment of the rights.
>
> . . . .
>
> Rule 37(b)(2)(A) itself embodies the standard established in *Hammond Packing Company v. Arkansas*, 212 U.S. 322 (1909), for the due process limits on such rules. There the court held that it did not violate due process for a state court to strike the answers and render a default judgment against a defendant who failed to comply with a pre-trial discovery order. Such a rule was permissible as an expression of the undoubted right of the lawmaking power to create a presumption of fact as to the bad faith and untruth of an answer begotten from the suppression or failure to produce the proof ordered. . . .
>
> . . . .
>
> Due process is violated only if the behavior of the defendant will not support the *Hammond Packing* presumption. A proper appli-

> cation of Rule 37(b)(2) will, as a matter of law, support such a presumption. See *Societe Internationale v. Rogers*, 357 U.S. 197, 209-213 (1958). *Id.* at 705,706.

The plaintiffs contend that their responses to discovery were "clumsy", but that they were not "contumacious" and that the trial court never found "bad faith". Under Indiana law, construing Indiana Rule of Trial Procedure Number 37(B), conduct can constitute "bad faith" within the meaning of Rule 37(B) even if it falls short of being deliberate or by design. *Hepp v. Pierce*, (1984), ___Ind.App. ___ , 460 N.E.2d 186. Furthermore, where the dismissal is based upon violation of a court order, the trial court need not find bad faith to justify dismissal. *Noble v. Moistner*, (1979), ___Ind.App. ___ , 388 N.E.2d 620. Where the dismissal is for failure to comply with discovery orders, Indiana law holds that the finding of bad faith is *implicit*. *Breedlove v. Breedlove*, (1981), ___Ind.pp. ___ , 421 N.E.2d 739.

The plaintiffs contend that they should not be penalized for the negligence of their counsel. However, the Supreme Court of the United States has held otherwise. *Link v. Wabash Railroad*, 370 U.S. 626 (1962). There, the Supreme Court stated:

> There is certainly no merit in the contention that the dismissal of the petitioner's claim because of his counsel's unexcused conduct imposes an unjust penalty on the client. . . . *Id.* at page 633.

In a footnote to that case, the Court made the wry observation that "keeping this suit alive merely because the plaintiff should not be penalized for the

omissions of his own attorney would be visiting the sins of the plaintiff's lawyer upon the defendant". (Footnote 10).

CONCLUSION

The entire record in this case justifies the imposition of the sanction of the dismissal of the plaintiffs' Complaint against A.M. Sunrise for repeated noncompliance with or outright violation of discovery orders. The plaintiffs were repeatedly warned that no further extensions of time would be granted, and repeatedly advised that failure to comply would result in the sanction of dismissal. Notwithstanding this, they failed to comply with court orders concerning discovery.

The dismissal of their claim against A.M. Sunrise was based on Interrogatories which did not require either expert opinion or documentation to answer.

The dismissal under Indiana Rule of Trial Procedure Number 37(B) and Indiana case law construing that rule is entirely consistent with decisions of the Supreme Court of the United States, which have held that where the sanction is appropriately applied, due process is not violated.

The Petitioners have shown no reason why their Petition for a Writ of Certiorari should be granted. The defendant, A.M. Sunrise Construction Company, Inc., respectfully prays that the Petition be denied.

Respectfully Submitted,

MICHAEL S. BAECHLE*
1000 E. 80th Place
Suite 422, South Tower
Merrillville, IN 46410
Phone: (219) 769-3422

Attorneys for Respondent A.M. Sunrise Construction Company, Inc.

**Attorney of Record*

Supreme Court, U.S.
FILED
DEC 16 1988
JOSEPH F. SPANIOL, JR.
CLERK

No. 88-864

IN THE

Supreme Court of the United States

OCTOBER TERM, 1988

JOSEPH STOUT and BARBARA STOUT,

Petitioners,

vs.

A.M. SUNRISE CONSTRUCTION COMPANY, INC. and COLE & ASSOCIATES, INC.,

Respondents.

BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF INDIANA AND THE INDIANA COURT OF APPEALS

STEVEN A. JOHNSON *
DANIEL A. GIOIA
KATHLEEN M. MAICHER
SPANGLER, JENNINGS, SPANGLER & DOUGHERTY, P.C.
8396 Mississippi Street
Merrillville, Indiana 46410
(219) 769-2323

Attorneys for Respondent,
COLE & ASSOCIATES, INC.

* Counsel of Record

Midwest Law Printing Co., Chicago 60611, (312) 321-0220

33 pp

QUESTIONS PRESENTED

I. Whether dismissal of a plaintiff's complaint as a sanction for allegedly failing to comply with a discovery order is a denial of due process where the defendants hid documents which the plaintiff needed for compliance and harassed the plaintiff's expert so that he withdrew from the case?

II. Is it a denial of due process to dismiss a complaint as a sanction for non-compliance with a discovery order where no finding was made that plaintiff's alleged failure was willful or in bad faith, and where defendants were not prejudiced because the information had already been provided except for plaintiff's expert's opinion and the underlying technical data needed by plaintiff's expert to give his opinion was in the documents defendants had hidden—and thus already had within their knowledge and control?

III. Is it a denial of due process where the plaintiff, a paraplegic, suffers dismissal of his complaint for the alleged failure of his counsel to make adequate responses to interrogatories and the plaintiff is totally blameless?

TABLE OF CONTENTS

	PAGE
QUESTIONS PRESENTED	i
TABLE OF AUTHORITIES	iv
OPINIONS BELOW	1
JURISDICTION	2
STATUTES INVOLVED	2
STATEMENT OF THE CASE	3
SUMMARY OF ARGUMENT	8
ARGUMENT	11
I. THIS COURT IS WITHOUT JURISDICTION TO REVIEW THE FINAL JUDGMENT OF THE SUPREME COURT OF INDIANA IN THIS CASE FOR THE REASON THAT THE ALLEGED FEDERAL QUESTIONS PRESENTED TO THIS COURT HAVE NEVER BEEN PROPERLY RAISED, PRESERVED OR PASSED UPON BY THE STATE COURT BELOW	11
II. DISMISSAL OF THE COMPLAINT OF THE PLAINTIFFS, JOSEPH AND BARBARA STOUT, AGAINST THE DEFENDANTS, COLE & ASSOCIATES, INC. AND A.M. SUNRISE CONSTRUCTION COMPANY, INC., WAS AN APPROPRIATE SANCTION FOR PLAINTIFFS' REPEATED FAILURE TO COMPLY WITH INDIANA COURT RULES AND THE TRIAL COURT'S DISCOVERY ORDERS	14

A. Cole Was Prejudiced And Its Rights Obstructed By Plaintiffs' Continued Non-Compliance With Court Orders 16

B. Petitioners' Charge Of Obstruction Of Justice Is Unfounded And Has No Factual Basis In The Record Before The Court .. 18

C. The Trial Court Need Not Have Specifically Found That The Plaintiffs Acted Willfully Or In Bad Faith 19

D. Plaintiffs' Answers To Cole's Interrogatories Were Inadequate And Plaintiffs Never Provided The Name Of Their Expert Witness As Directed By The Court On February 22, 1985 21

III.

DISMISSAL OF THE PLAINTIFFS' COMPLAINT AS A SANCTION FOR NON-COMPLIANCE WITH PRE-TRIAL DISCOVERY REQUESTS IS NOT A VIOLATION OF THE DUE PROCESS GUARANTEES OF THE PLAINTIFFS IN THAT THE PLAINTIFFS ARE RESPONSIBLE FOR THEIR ATTORNEY'S ACTS OR OMISSIONS 23

CONCLUSION 25

APPENDIX—Court of Appeals' Denial of Petition for Rehearing A-1

TABLE OF AUTHORITIES

CASES:	PAGE
Breedlove v. Breedlove, ___ Ind. App. ___, 421 N.E.2d 739 (1981)	20
Burns v. St. Mary Medical Center, ___ Ind. App. ___, 504 N.E.2d 1038 (1987)	19
Cine Forty-Second Street Theater Corporation v. Allied Artists, 602 F.2d 1062 (2nd Cir. 1979)	24
Farm Construction Services, Inc. v. Fudge, 831 F.2d 18 (1st Cir. 1987)	24
Foote v. Baltimore & Ohio Railroad Company, ___ Ind. App. ___, 465 N.E.2d 219 (1984)	20
Greenbriar Hills, Inc. v. Boes, ___ Ind. App. ___, 473 N.E.2d 1040 (1985)	12
Ingalls Shipbuilding, Inc. v. United States, 857 F.2d 1448 (Fed. Cir. 1988)	18
Kagan v. Caterpillar Tractor Company, 795 F.2d 601 (7th Cir. 1986)	24
Link v. Wabash Railroad Co., 370 U.S. 626, 82 S.Ct. 1386 (1962)	23, 24
Mulroe v. Angerman, ___ Ind. App. ___, 492 N.E.2d 1077 (1986)	19, 20
National Hockey League v. Metropolitan Hockey Club, Inc., 427 U.S. 639, 96 S.Ct. 2778 (1976)	16, 20
Nichols v. Indiana State Highway Department, ___ Ind. App. ___, 491 N.E.2d 227 (1986)	20
Orkin Exterminating Company, Inc. v. Traina, ___ Ind. App. ___, 486 N.E.2d 1019 (1986)	12

Pitts v. Johnson County Department of Public Welfare, ____ Ind. App. ____, 491 N.E.2d 1013 (1986) 20

Thompson v. Daviess-Martin County REMC, ____ Ind. App. ____, 486 N.E.2d 1102 (1985) 12

Tolliver v. Northrop Corp., 786 F.2d 316 (7th Cir. 1986) 24

Williams v. Graber, ____ Ind. App. ____, 485 N.E. 2d 1369 (1985) 12

Webb v. Webb, 451 U.S. 493, 101 S.Ct. 1889 (1981) . 13, 14

OTHER AUTHORITIES:

Supreme Court Rule 21.1(h) 11

Indiana Rules of Trial Procedure, Rule 37(A)(3) 12, 23

Indiana Rules of Trial Procedure, Rule 37(B)(2)(c) 12, 19, 20

Indiana Rules of Trial Procedure, Rule 59 12

STATUTES:

28 U.S.C. § 1257(3) 2, 11

No. 88-864

IN THE

Supreme Court of the United States

OCTOBER TERM, 1988

JOSEPH STOUT and BARBARA STOUT,

Petitioners,

vs.

A.M. SUNRISE CONSTRUCTION COMPANY, INC. and COLE & ASSOCIATES, INC.,

Respondents.

BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF INDIANA AND THE INDIANA COURT OF APPEALS

OPINIONS BELOW

The dismissal orders of the trial court, the Porter Superior Court sitting at Valparaiso, Indiana, are set forth in Appendices A-1 and A-2 of the petition filed in this case; the petitioners, however, have erroneously referred to the dismissal orders of the "Superior Court of Lake

County, Indiana" in the body of their Petition. *See* Petition, p. 1.

Petitioners include the opinion of the Court of Appeals of Indiana, Fourth District, and the denial of their Petition to Transfer by the Supreme Court of Indiana in Appendix B and Appendix C of the petition. Omitted from the petition is the denial of their Petition for Rehearing to the Court of Appeals of Indiana, Fourth District, filed by petitioners. That is set forth in the Appendix of this brief. *See* Appendix A.

JURISDICTION

Respondent, Cole & Associates, Inc., disagrees with the statement of jurisdiction presented. Petitioners attempt to invoke this Court's jurisdiction pursuant to 28 U.S.C. § 1257(3) (1982). As applied to the circumstances of this case, petitioners must show that they have "specially set up or claimed under the Constitution . . . of . . . the United States" the right sought to be enforced here. The alleged federal questions raised here have never been raised, preserved or passed upon in the state courts below. Therefore, this Court is without jurisdiction in this case.

STATUTES INVOLVED

The statutes allegedly involved are adequately set forth in the petition.

STATEMENT OF THE CASE

The petition stems from the dismissal of the plaintiffs' cause of action by the Porter Superior Court for their repeated failure to comply with the Court's discovery orders.

On October 3, 1979, Joseph and Barbara Stout, by their attorneys, Leonard Ring and Associates, filed a Complaint naming A.M. Sunrise Construction Company, Inc. (A.M. Sunrise), Cole & Associates, Inc. (Cole), and Central Rent-A-Crane, Inc. (Central Crane) as defendants. The action for personal injuries arose out of an alleged incident on October 3, 1977 at the construction site of the George Bibich Elementary School in Dyer, Lake County, Indiana, in which the plaintiff, Joseph Stout, fell from a beam approximately fourteen (14) feet above the ground while engaged in securing such beam to a steel column.

On October 23, 1979, Cole filed its Answer (R., pp. 63, 66). Answers were subsequently filed by Central Crane on November 7, 1979 and by A.M. Sunrise on December 7, 1979 (R., pp. 71, 117). Filed concurrently with A.M. Sunrise's Answer was a Third Party Complaint against C & C Iron, Inc. (R., p. 121). On April 29, 1980, Central Crane also filed a Third Party Complaint against C & C Iron, Inc. (R., p. 171). Cole was the architectural/engineering firm retained to design the building. A.M. Sunrise was the general contractor and Central Crane provided the crane and crane operator for the building project. A.M. Sunrise subcontracted the steel work on the construction project to C & C Iron, Inc. Thereafter, various measures were taken by the parties to pursue discovery.

On March 4, 1981, the deposition of John Chandler, a representative of C & C Iron, Inc., was taken. At that deposition, these questions were asked of Mr. Chandler and these answers were given:

Q. And was it your company that made the determination of how to put the steel up?

A. Yes.

Q. Did your company provide shop drawings for the fabrication of the steel structures?

A. Yes.

Q. And do you have those shop drawings?

A. At our place of business, yes.

* * * *

Q. Mr. Chandler, upon your attorney's advice to you, will you be willing to produce your file in this case for the inspection of all the parties in this case?

A. Yes.

Q. And do you have that in your possession at the present time?

A. Yes.

(R., p. 845/pp. 81-83).

Cole found it necessary to take the following actions to obtain responses from the plaintiffs to its discovery requests. On May 21, 1982, Cole served its first set of Interrogatories upon the plaintiffs (R., p. 383). The plaintiffs did not respond within the time set forth in Rule 33 and did not seek or obtain an extension from the trial court. As a result, Cole filed a Motion for Sanctions against the plaintiffs on September 20, 1982 (R., p. 393). Cole renewed its motion on May 22, 1984 (R., p. 418). The trial court ordered the plaintiffs to answer the Interrogatories by June 13, 1984 or suffer sanctions (R., p. 419). On June 11, 1984, the plaintiffs filed a Motion for Extension of Time in which to answer Cole's Interrogatories (R., p. 420). On July 24, 1984, the trial court ordered those Interrogatories to be answered within fifteen (15) days

of issuance of that Order (R., p. 422). At that time, the trial court also set the final pre-trial conference for May 31, 1985 at 9:00 a.m. and scheduled the trial, as a primary setting, for the week of July 8, 1985 (R., p. 422).

On August 8, 1984, the plaintiffs filed their objections and answers to the Interrogatories propounded by Cole approximately two (2) years earlier on May 21, 1982. Of ten (10) Interrogatories, five (5) were answered by the plaintiffs as "None," "Investigation continues," or "Not applicable" (R., pp. 426-427).

Cole propounded a second set of seventeen (17) Interrogatories to the plaintiffs on August 15, 1984 (R., p. 440). To obtain their responses, Cole filed a Motion to Compel Answers to Interrogatories on December 14, 1984, approximately six (6) months before trial (R., p. 440). The court ordered the plaintiffs to answer Cole's Interrogatories within fifteen (15) days of the signing of the Order or suffer sanctions by the Court (R., p. 441). Plaintiffs then submitted a Motion for Extension of Time for an additional ten (10) days in which to answer the Interrogatories (R., p. 441). A hearing was set by the trial court on Cole's Motion for Sanctions on January 10, 1985 (R., p. 441). Plaintiffs filed their purported Answers to Interrogatories on January 8, 1985 and moved the court to reset the hearing on Cole's Motion for Sanctions to February 21, 1985 (R., p. 451).

Thereafter, on January 15, 1985, Cole filed with the Court a *second* Motion to Compel Answers to Interrogatories Nos. 3, 4, 5, 6, 7, 8, 9, 10, 11, 12, 14 and 15 previously filed on August 15, 1984 (R., p. 452). Of the seventeen (17) Interrogatories propounded to the plaintiffs, eight (8) were answered in full or in part "Unknown at this time. The investigation continues;" nine (9) were ob-

jected to in some manner six (6) months before trial (R., pp. 443-450). The trial court set the matter for hearing on January 28, 1985 at 9:00 a.m. (R., p. 455). Plaintiffs then moved, ex parte, for a continuance of the January 28, 1985 hearing date and requested the court to consolidate all pending motions with respect to discovery for hearing on February 21, 1985 at 9:00 a.m. (R., p. 463).

After hearing arguments on Cole's Motion for Sanctions on February 21, 1985, the trial court, on February 22, 1985, ordered plaintiffs to answer Interrogatory Nos. 3, 4, 8, 12 and 14 of the Interrogatories propounded by Cole and to provide the name and address of their expert witness by 4:30 p.m. on March 4, 1985 (R., p. 574). That order specifically indicated that *if such information was not furnished, plaintiffs' Complaint against Cole would be dismissed with prejudice* (R., p. 574). On March 1, 1985, plaintiffs filed and obtained an additional ex parte extension of time not to exceed fourteen (14) days in which to provide the necessary answers (R., p. 588). The court granted such motion extending the plaintiffs' deadline to March 18, 1985 to respond to the Interrogatories, indicating that no further extensions would be granted (R., p. 591). Plaintiffs filed a second set of responses to the Interrogatories propounded by both A.M. Sunrise and Cole on March 18, 1985 (R., p. 612). Of the five (5) Interrogatories the plaintiffs were to answer for Cole, plaintiffs responded to four (4) with the answer "*Unknown at this time, investigation continues;*" one (1) Interrogatory was answered as "*Unknown,*" approximately one hundred twenty (120) days before trial (R., pp. 612-619). Plaintiffs further failed to provide the name and address of their expert witness. On March 19, 1985, after argument by counsel for all parties, the court granted Cole's motion for dismissal.

On April 2, 1985, A.M. Sunrise filed its Motion for Dismissal and the court signed the order the same day (R., p. 639). This marked the *third* time in this case that the trial court dismissed plaintiffs' Complaint against a defendant, with prejudice, for failure to comply with the rules of discovery and court imposed deadlines to enforce compliance with those rules. Plaintiffs' Complaint against Central Crane was dismissed on August 21, 1982 for plaintiffs' failure to comply with the trial court's order requiring them to respond to Central Crane's discovery requests (R., p. 397).

Subsequent to the dismissals, the plaintiffs inundated the trial court with post-trial motions (R., pp. 641, 746, 754, 767). Hearings were held on virtually every motion filed by the plaintiffs (R., pp. 735, 760, 775). Plaintiffs then filed three (3) separate Motions to Correct Errors, all of which were denied by the trial court on January 29, 1986 (R., p. 793).

Plaintiffs perfected an appeal to the Court of Appeals of Indiana. On March 30, 1987, the Court of Appeals affirmed the dismissal by the trial court. Rehearing was denied by the Court of Appeals on May 26, 1987. Plaintiffs then filed a Petition for Transfer to the Supreme Court of Indiana. The Supreme Court of Indiana denied plaintiffs' Petition to Transfer on August 23, 1988.

As stated in the petition, the plaintiffs raised the questions presented here for the first time in the Petition for Rehearing before the Court of Appeals of Indiana, Fourth District. The alleged federal questions for which review is being sought by the plaintiffs were never raised or addressed before the trial court in any of the three (3) Motions to Correct Errors filed with that court, and were never raised or briefed before the Court of Appeals on first review.

SUMMARY OF ARGUMENT

This Court is without jurisdiction to review the final judgment of the Supreme Court of Indiana in this case in that the alleged federal questions presented to this Court have never been properly raised, preserved or passed upon by the state courts below. Under Indiana law, to initiate an appeal a Motion to Correct Errors must be filed pursuant to Indiana Rules of Trial Procedure, Rule 59. An error not specifically raised in a party's Motion to Correct Errors is deemed waived on appeal. Plaintiffs filed three (3) Motions to Correct Errors in this matter; none of these motions contained any reference to a federal due process claim. No such issue was briefed before the Court of Appeals of Indiana on first review. In fact, plaintiffs admit in their petition that the due process claims were first presented in their Petition for Rehearing before the Court of Appeals of Indiana. Obviously, the Court of Appeals did not pass upon the issue of due process and the Supreme Court of Indiana is similarly bound to review only those issues expressly raised in the opinion of the Court of Appeals. Plaintiffs' admission that the federal issue of due process was raised for the first time in their Petition for Rehearing before the Court of Appeals of Indiana is tantamount to an admission of waiver of any right to raise a federal issue at this juncture.

Assuming *arguendo* that jurisdiction exists to review the Petition for Writ of Certiorari of the plaintiffs, their claims must fail on the merits. Contrary to plaintiffs' statements, Cole was prejudiced by the actions of the plaintiffs. Plaintiffs' failure to name an expert and their refusal to give specific answers to Cole's Interrogatories

approximately one hundred twenty (120) days before trial denied Cole the opportunity of learning plaintiffs' theories of liability and specific allegations of negligence. Cole had a right to this information in order to prepare a proper defense. Plaintiffs' actions also denied Cole sufficient time to find a suitable expert to rebut the opinions upon which plaintiffs would rely to prove their theory of liability.

Plaintiffs' allegations of "obstruction of justice" are also without foundation. No actions on the part of the defendant, Cole, prevented the plaintiffs from complying with the trial court's orders compelling them to file specific responses to Cole's Interrogatories. Cole did not deliberately conceal any documents nor did it intentionally give false information about the identity and/or location of witnesses. The very documents which the plaintiffs characterize as critical were in the possession of C & C Iron, Inc. since the inception of this litigation. Plaintiffs made no attempt to obtain these documents until *March 1, 1985.* After notification of the location of the documents, plaintiffs took *no* further steps to obtain them.

Similarly, plaintiffs' contentions that their actions were not willful or done in bad faith are incorrect; the record in this case speaks for itself. It contains glaring examples of plaintiffs' continual non-compliance with court orders made to protect the rights of each defendant. Contrary to plaintiffs' assertions, Central was dismissed from this suit as a result of plaintiffs' deliberate failure to respond to a discovery request. Plaintiffs' theory that they purposely allowed a default is without any substantive support in the record. Further, it took Cole approximately two (2) years and two (2) Motions for Sanctions to obtain the answers to ten (10) Interrogatories filed in May, 1982. The answers to five (5) Interrogatories were as follows "None," "Investigation continues," and "Not applicable."

Even under threat of dismissal from the trial court, plaintiffs never sufficiently answered Cole's second set of Interrogatories, nor did they reveal the name of their expert. Moreover, and again contrary to plaintiffs' assertions, earlier discovery in the form of plaintiffs' Answers to Central's Interrogatories, plaintiffs' Answers to Cole's first set of Interrogatories and the deposition of plaintiff, Joseph Stout, did not provide the information sought by Cole in its second set of Interrogatories. Dismissal was warranted as a sanction in response to the repeated delays and contumacious conduct evidenced by the plaintiffs and borne out by the record in this case.

Further, the fact that plaintiffs' Complaint had been dismissed as to all defendants as a result of the intransigence of their attorneys does not constitute an infringement of their due process guarantees, particularly under the facts of this case. This Court has clearly established the principle that a litigant is bound to his lawyer's acts. Plaintiffs voluntarily chose their attorneys as their representatives and they cannot now avoid the consequences of their acts or omissions.

ARGUMENT

I.

THIS COURT IS WITHOUT JURISDICTION TO REVIEW THE FINAL JUDGMENT OF THE SUPREME COURT OF INDIANA IN THIS CASE FOR THE REASON THAT THE ALLEGED FEDERAL QUESTIONS PRESENTED TO THIS COURT HAVE NEVER BEEN PROPERLY RAISED, PRESERVED OR PASSED UPON BY THE STATE COURT BELOW.

Plaintiffs have filed a Petition for Writ of Certiorari seeking review of three (3) alleged federal questions, each question invoking the due process clause of the United States Constitution. They attempt to invoke the jurisdiction of this Court pursuant to 28 U.S.C. § 1257(3) (1982). That statute requires that the plaintiffs have "specially set up or claimed under the Constitution . . . of . . . the United States" in the state courts the right they now seek to have enforced. Further, Rule 21.1(h) of this Court requires that the plaintiffs "specify the stage in the proceedings, *both in the court of first instance and in the Appellate Court* at which the federal question sought to be reviewed were raised; the method or manner of raising them and the way in which they were passed upon by the court . . . . (Emphasis added). To comply with Supreme Court Rule 21.1(h), plaintiffs stated the following:

> The federal question was *first* fully presented in the Appellate Court by *Stouts' Petition for Rehearing.*

Petition, p. 6. (Emphasis added). No further information is offered to indicate how the question was allegedly raised or how the court acted upon it.

Raising a federal question as an issue on appeal for the first time in a Petition for Rehearing is not sufficient to

preserve that issue for review by this Court. Under Indiana law, error not brought to the attention of the trial court is waived. *Thompson v. Daviess-Martin County REMC*, ____ Ind. ____, 486 N.E.2d 1102, 1104 (1985). To initiate an appeal in Indiana, a party must file a Motion to Correct Errors pursuant to Indiana Rules of Trial Procedure, Rule 59. An error not specifically raised in the party's Motion to Correct Errors is deemed waived on appeal. *Orkin Exterminating Company, Inc. v. Traina*, ____ Ind. ____, 486 N.E.2d 1019, 1025 (1986); *Williams v. Graber*, ____ Ind. App. ____, 485 N.E.2d 1369, 1377 (1985); *Greenbriar Hills, Inc. v. Boes*, ____ Ind. App. ____, 473 N.E.2d 1040, 1042 (1985). Three (3) Motions to Correct Errors were filed in this case (R., p. 793). A review of these pleadings demonstrates that no federal question was raised. Thus, under Indiana law, the plaintiffs have waived any federal question for purposes of appeal. If the questions were not properly before the Indiana Court of Appeals for review, they cannot be properly before this Court for review.

Similarly, a review of the plaintiffs' initial brief to the Court of Appeals of Indiana demonstrates that *no* due process question was before that court. The entire thrust of plaintiffs' brief was directed to the appropriateness of dismissal as a first sanction under Rule 37 of the Indiana Rules of Trial Procedure, dealing with failure to make or cooperate in discovery, a rule strikingly similar, if not identical to, Federal Rule of Civil Procedure 37. It should be no surprise that nowhere in the opinion of the Court of Appeals of Indiana is any federal question involving due process mentioned, let alone expressly passed upon, and it is that opinion that was before the Indiana Supreme Court on the Petition for Transfer. *See* Petition, Appendix B-1.

This Court has frequently stated that when "the highest state court has failed to pass upon a federal question, it will be assumed that the omission was due to want of proper presentation in the state courts, unless the aggrieved party can affirmatively show the contrary." *Webb v. Webb*, 451 U.S. 493, 495, 101 S.Ct. 1889, 1891 (1981). Here, the plaintiffs cannot rebut the assumption; their statement that federal due process claims were presented for the first time in their Petition for Rehearing is an express admission of waiver of those issues on appeal under the law of the State of Indiana.

In *Webb v. Webb*, *supra*, this Court was presented with a factual situation similar to the one in this case. *Webb* involved a custody dispute between the mother and father of a minor child. A Georgia trial court awarded custody of the child to the former husband and the wife appealed. The Georgia Supreme Court affirmed and the wife petitioned for certiorari. This Court found that she failed to raise the issue in the state proceedings, that the Georgia Supreme Court failed to rule on the federal issue and that, as a consequence, it had no jurisdiction in this case. *Webb*, 451 U.S. at 501-502, 101 S.Ct. at 1894. In so doing, the Court spoke to the issue of comity as a compelling rationale for their decision stating that the principle of comity requires:

> [A] proper respect for state functions, a recognition of the fact that the entire country is made up of a Union of separate state governments, and a continuance of the belief that the National Government will fare best if the States and their institutions are left free to perform their separate functions in their separate ways.

Webb, 451 U.S. at 499-500, 101 S.Ct. at 1893. (Citations omitted).

As in *Webb*, the state courts in this case have not been afforded fair opportunity to address the federal question of due process sought to be presented. It is clear that no federal due process claim was presented to the state trial court through a Motion to Correct Errors, the initial step in perfecting an appeal under Indiana law, no such question was raised in the initial brief to the Court of Appeals of Indiana, and no such question was mentioned or passed upon by the Court of Appeals of Indiana, the court whose opinion was the focus of review by the Supreme Court of Indiana. Since the federal questions involving due process have not been properly preserved, this Court should deny plaintiffs' Petition for Writ of Certiorari.

II.

DISMISSAL OF THE COMPLAINT OF THE PLAINTIFFS, JOSEPH AND BARBARA STOUT, AGAINST THE DEFENDANTS, COLE & ASSOCIATES, INC. AND A.M. SUNRISE CONSTRUCTION COMPANY, INC., WAS AN APPROPRIATE SANCTION FOR PLAINTIFFS' REPEATED FAILURE TO COMPLY WITH INDIANA COURT RULES AND THE TRIAL COURT'S DISCOVERY ORDERS.

Assuming *arguendo* that this Court has jurisdiction of this matter, a review of the record will clearly demonstrate that the plaintiffs were not denied due process in the state proceedings. This case had been pending for approximately six (6) years at the time of dismissal. During that period, petitioners had displayed indifference to the proceedings and a proclivity for dilatory tactics. The record is replete with instances of plaintiffs' failure to voluntarily comply with the Indiana Rules of Trial Procedure. No attempt was made to submit responses to discovery requests within the thirty (30) day period set out in Indiana Rule of Trial Procedure 33. Similarly, the plain-

tiffs ignored court orders requesting that they make answers more specific. The trial court displayed great patience in giving the plaintiffs numerous opportunities to comply with its orders before dismissing the Complaint of the plaintiffs against all *three* (3) defendants. It specifically advised the plaintiffs that if sufficient answers were not provided to Cole, dismissal would result. Irrespective of this warning, incomplete answers were filed in response to the court's order, the name of the plaintiffs' expert witness was never provided and dismissal followed.

After the dismissal, the trial court was inundated with countless post-trial motions. Approximately three (3) hearings were held on the motions. Pages of transcript reveal that the trial court examined each of the spurious claims and excuses of the plaintiffs. Even after such scrutiny, the trial court found *no reason* to alter its Order of Dismissal.

The Court of Appeals was the *second* court to review this matter. Plaintiffs filed a brief of approximately fifty (50) pages with a thirty-five (35) page Appendix and a Reply Brief of twenty-two (22) pages. After review of this material, the Court of Appeals of Indiana affirmed the dismissal of the plaintiffs' Complaint against Cole & Associates, Inc., and A.M. Sunrise because it found that the plaintiffs had "evinced a pattern of blatant disregard for the trial court's orders concerning discovery." Petition, Appendix pp. B-6 - B-7. The Court of Appeals of Indiana found no single act of non-compliance by the plaintiffs against any one defendant; it found a *pattern* of blatant non-compliance against each defendant, Central Crane, Cole & Associates, Inc. and A.M. Sunrise, throughout the course of the litigation spanning six (6) years. After a *second* forty-one (41) page brief filed by the plaintiffs in sup-

port of their Petition for Rehearing, the Court of Appeals denied the Petition for Rehearing. Appendix A-1.

Subsequently, a *third* court, the Supreme Court of Indiana, reviewed this case on plaintiffs' Petition to Transfer with the benefit of a third forty-five (45) page brief in support of their petition and with the benefit of oral argument before the Court. Transfer was denied. Petition, Appendix C-1.

Plaintiffs seek now to invoke yet a *fourth* court's review of this record alleging that this Court's precedent supports their contention that the dismissal of their Complaint violated their due process guarantees. Federal decisions dealing with dismissal as a result of disobedience of a trial court's orders fully support the results reached by each court in this case under Indiana law. Once a plaintiff has disobeyed an *express order by a court* without substantial justification, dismissal may be freely ordered. *National Hockey League v. Metropolitan Hockey Club, Inc.*, 427 U.S. 639, 642, 96 S.Ct. 2778, 2780-81 (1976). As the Court of Appeals of Indiana noted, the record supports a pattern of such disobedience, not a solitary incident. Dismissal was appropriate and no due process guarantees were infringed.

A. Cole Was Prejudiced And Its Rights Obstructed By Plaintiffs' Continued Non-Compliance With Court Orders.

Plaintiffs falsely contend that Cole already possessed all the information it was seeking in its discovery requests. Plaintiffs argue that since Cole had filed a Certificate of Readiness, that act demonstrated that Cole was not prejudiced or delayed by plaintiffs' failure to provide pertinent information necessary for the defense of this litigation. The filing of a Certificate of Readiness in the Porter

Superior Court is simply a predicate to obtaining a date for a pre-trial conference and a trial setting. It is not an iron-clad document attesting to the fact that no further preparation for trial is necessary. Despite the fact that a Certificate of Readiness was filed in 1981, the final pre-trial conference was not set until May 31, 1985 and the trial was set for the week of July 8, 1985. It is obvious that the plaintiffs' attorneys were, and still are, unfamiliar with the local rules of the trial court in which they "vigorously" litigated a case that was pending for six (6) years.

Nor do plaintiffs understand the effect of the delay and prejudice by their failure to name an expert witness approximately one hundred twenty (120) days before trial. The trial court and the Court of Appeals of Indiana recognized that the failure of the plaintiffs to retain an expert to prove their theories of liability and specific allegations of negligence one hundred twenty (120) days prior to trial effectively precluded Cole from learning the theories and specific allegations against which it would defend. Plaintiffs' actions denied Cole ample opportunity to find a suitable expert with sufficient time to learn the case.

Plaintiffs' claim that prior responses to a set of ten (10) Interrogatories from Cole and several depositions taken earlier in this action supplied all the information needed by Cole. Cole would remind the Court that of the first set of ten (10) Interrogatories propounded by Cole, the plaintiffs answered five (5) of those dealing with expert witnesses and their testimony, "None," "Investigation continues," or "Not applicable." Further, the depositions of the plaintiff, Joseph Stout, Joseph Stout's employer, and the records deposition of Mr. Stout's workmen's compensation carrier offered no information as to the specific acts or omissions of negligence on the part of Cole that caused or contributed to the alleged accident, the docu-

ments in the possession of the plaintiffs which would prove the acts of negligence alleged against Cole, the details that would substantiate that there was a mechanical or structural failure, or the plaintiffs' expert witness. Plaintiffs' good faith and veracity must be questioned where they make a claim that Cole had all the information it required through prior discovery requests when such claim can be, and has been, proven false through a simple review of the record. In *Ingalls Shipbuilding, Inc. v. United States*, 857 F.2d 1448 (Fed. Cir. 1988), a case cited by the plaintiffs in which a discovery sanction precluded a party from introducing further evidence on an issue, the court reversed and remanded because it found that the moving party had the necessary information in its possession. That case has no applicability here. Cole did not have in its possession the information sought in its second set of Interrogatories.

B. Petitioners' Charge Of Obstruction Of Justice Is Unfounded And Has No Factual Basis In The Record Before The Court.

Plaintiffs' specific charges of obstruction of justice are blatant untruths. Cole never falsely denied that it had employed an engineer or engineering firm on the construction project in question. Cole was the architectural/engineering firm on the project; it had no need to "employ" or "engage" anyone since their own staff was available to perform any assignment. The plaintiffs never asked Cole to state the name of its staff engineer assigned to the project.

As for the "withheld documents," the trial court entertained numerous post-trial motions on this issue. In addition, three (3) lengthy and comprehensive hearings were held on this issue and the trial court gave no credence

to the plaintiffs' allegations. The Court of Appeals of Indiana noted this in its opinion. *See* Petition, Appendix B-1, pp. B-1 - B-7, n.5. The record will reflect that the trial court stated numerous times that the dismissal order was not based upon any considerations specifically related to the documents plaintiffs claim were withheld from them; rather, the dismissals were based upon the plaintiffs' repeated failure to comply with the court's discovery orders. (R., pp. 877, 898-890).

Further, the very documents which the plaintiffs characterize as critical, were in the possession of C & C Iron, Inc. since the inception of this litigation. Plaintiffs were aware of this since May 4, 1981 at the time the deposition was taken of John Chandler, a representative of C & C Iron, Inc., and it was established that C & C Iron, Inc. had the necessary documents. Plaintiffs made no attempt to locate these documents until March 1, 1985 and took no steps to obtain such documents once such information was provided to them.

C. The Trial Court Need Not Have Specifically Found That The Plaintiffs Acted Willfully Or In Bad Faith.

Trial Rule 37(B)(2)(c) of the Indiana Rules of Trial Procedure allows a trial court to impose the sanction of dismissal if a party fails to *obey an order* to provide or permit discovery. *See also Burns v. St. Mary Medical Center*, ____ Ind. App. ____, 504 N.E.2d 1038, 1039 (1987); *Mulroe v. Angerman*, ____ Ind. App. ____, 492 N.E.2d 1077, 1080 (1986). A specific finding of bad faith need not be made by the trial court; the record in this case, however, is replete with repeated incidents of violations of the trial court's orders. The trial court carefully considered the record in this case and gave explanations of its rulings in hearings on post-dismissal motions which are included in

the record of this case (R., pp. 877, 898-890). The failure of plaintiffs' counsel to respond to discovery requests was not due to "inability" fashioned by circumstances beyond his control. Rather, the longstanding delay in basic discovery compliance can only be characterized as "willful." In fact the circumstances in this case are not unlike those in *National Hockey League, supra,* in which this Court found sufficient evidence of "flagrant bad faith" and "callous disregard" of responsibility to uphold the District Court's dismissal of the action. *See National Hockey League,* 427 U.S. at 640-641, 96 S.Ct. at 2779-80. (Plaintiff's counsel repeatedly failed to answer Interrogatories or otherwise object in a timely fashion despite warnings from the court that failure to respond would result in sanctions).

Further, the case law of Indiana construing Rule 37 (B)(2)(c) fully supports the use of dismissal as a first sanction. The various districts of the Court of Appeals of the State of Indiana unanimously support the position that dismissal is permitted when the record before the trial court evidences a clear record of delay or numerous instances where a party defies or disobeys a trial court's orders. *Mulroe v. Angerman,* 492 N.E.2d at 1079; *Pitts v. Johnson County Department of Public Welfare,* ____ Ind. App. ____, 491 N.E.2d 1013, 1015 (1986); *Nichols v. Indiana State Highway Department,* ____ Ind. App. ____, 491 N.E.2d 227, 229 (1986); *Foote v. Baltimore & Ohio Railroad Company,* ____ Ind. App. ____, 465 N.E.2d 219, 222 (1984); *Breedlove v. Breedlove,* ____ Ind. App. ____, 421 N.E.2d 739, 743 (1981).

Further, plaintiffs argue that the Court of Appeals attributed an unwarranted interpretation to the prior dismissal of defendant, Central Crane. Contrary to plaintiffs' contentions, Central was dismissed from the suit as a re-

sult of plaintiffs' failure to respond to a discovery request. Plaintiffs' theory, that they purposely allowed a default, is suspect in that it was never offered to the trial court or to the Court of Appeals in their initial brief; this argument was raised for the first time in plaintiffs' Petition for Rehearing before the Court of Appeals of Indiana.

D. Plaintiffs' Answers To Cole's Interrogatories Were Inadequate And Plaintiffs Never Provided The Name Of Their Expert Witness As Directed By The Court On February 22, 1985.

Plaintiffs would have this Court believe that their revised answers were sufficient to Cole's second set of Interrogatories "under the circumstances." A review of what the record will reveal about these responses is in order.

In its Order of February 22, 1985, the trial court ordered more specific answers to five (5) Interrogatories. Interrogatory No. 3 requested the specific acts or omissions of negligence on the part of Cole that caused or contributed to the alleged accident at issue. As a response, the plaintiffs did list nineteen (19) acts of purported negligence but this was merely a repetition of the list of negligent acts that appeared on the face of their Complaint filed in October of 1979 (R., pp. 613-614).

Interrogatory No. 4 requested that plaintiffs identify any statutes, regulations, rules or orders that plaintiffs claim Cole violated (R., p. 614). Plaintiffs responded that they did not know, inasmuch as they had not been able to retain an expert willing to give a written opinion on the matter. As noted by the Court of Appeals, at the same time the plaintiffs contended that they had lost their expert because of a conflict, the plaintiffs' counsel acknowledged in an Affidavit in a post-trial motion that he

had contacted and was working with another expert at that time. The Court of Appeals further noted that the plaintiffs did not meet with an engineering expert until 1985 although the action had been on file since October of 1979. *See* Petition Appendix B-5, n.4.

As for plaintiffs' argument that their second expert was denied access to documents he needed for a proper evaluation of the case, Cole would reiterate that the "withheld documents" were available at C & C Iron, Inc. as early as March, 1981; a special request for this material was made by the plaintiffs in March of 1985 and they were advised that such materials were at the office of C & C's counsel. They made no attempt, however, to obtain those documents.

Interrogatory No. 8 sought information directed at documents in the possession of the plaintiffs to prove the acts of negligence alleged against Cole (R., p. 616). In response, plaintiffs listed the documents obtained through the discovery process to date, most of which were supplied by Cole or other parties. Interrogatory No. 12 requested information relative to actual or constructive notice of any negligence by Cole (R., p. 617). Four (4) months before trial, the plaintiffs answered "Unknown." As with the other Interrogatories, the answers supplied by plaintiffs do not reveal any more information as to what Cole was to defend itself against in this lawsuit.

Cole's Interrogatory No. 14 asks for details that substantiated the contention that there was a mechanical or structural failure. Again, four (4) months before trial, plaintiffs offered the list of allegations stated in their Complaint filed in October, 1979 before any discovery could have taken place.

These answers were incomplete and evasive and pursuant to Trial Rule 37(A)(3), such answers are to be treated as a *failure* to answer. On March 19, 1985, after two (2) sets of Interrogatories totaling twenty-seven (27) requests, two (2) Motions to Compel, two (2) Motions for Sanctions, and numerous extensions of time, Cole had no more information upon which to defend this litigation than it had in October, 1979 when the suit was filed. Under these circumstances, both case authority and Trial Rule 37 of the Indiana Rules of Trial Procedure allow the use of the sanction of dismissal if warranted by repeated delays and contumacious conduct as evidenced by the plaintiffs in this case.

III.

DISMISSAL OF THE PLAINTIFFS' COMPLAINT AS A SANCTION FOR NON-COMPLIANCE WITH PRE-TRIAL DISCOVERY REQUESTS IS NOT A VIOLATION OF THE DUE PROCESS GUARANTEES OF THE PLAINTIFFS IN THAT THE PLAINTIFFS ARE RESPONSIBLE FOR THEIR ATTORNEY'S ACTS OR OMISSIONS.

Plaintiffs contend that the dismissal of their Complaint further deprives them of due process guarantees because they, themselves, were innocent of any wrongdoing. This argument would require this Court to ignore its own established precedent. In *Link v. Wabash Railroad Co.*, 370 U.S. 626, 82 S.Ct. 1386 (1962), this Court expressly stated:

> There is certainly no merit to the contention that dismissal of petitioner's claim because of his counsel's unexcused conduct imposes an unjust penalty on the client. Petitioner voluntarily chose this attorney as his representative in the action and he cannot now avoid the consequences of the acts or omissions of this freely selected agent. Any other notion would be wholly inconsistent with our system of represen-

> tative litigation, in which each party is deemed bound by the acts of his lawyer-agent and is considered to have 'notice of all facts, notice of which can be charged upon the attorney.'

Id. 370 U.S. at 633-634, 82 S.Ct. at 1390. (Citations omitted).

Further, in a footnote the Court goes on to say:

> And if an attorney's conduct falls substantially below what is reasonable under the circumstances, the client's remedy is against the attorney in a suit for malpractice. But keeping this suit alive merely because plaintiff should not be penalized for the omissions of his own attorney would be visiting the sins of plaintiff's lawyer upon the *defendant* . . . .

Id. 370 U.S. at 634, n.10, 82 S.Ct. at 1390, n.10. (Emphasis in the original). *See also Farm Construction Services, Inc. v. Fudge*, 831 F.2d 18, 20 (1st Cir. 1987); *Kagan v. Caterpillar Tractor Company*, 795 F.2d 601, 611 (7th Cir. 1986); *Tolliver v. Northrop Corp.*, 786 F.2d 316, 319 (7th Cir. 1986); *Cine Forty-Second Street Theater Corp. v. Allied Artists*, 602 F.2d 1062, 1068 (2nd Cir. 1979).

A trial court's power to dismiss a case is designed both to elicit action for the parties in the case at hand and to induce litigants and lawyers in other cases to adhere to timetables. A court cannot lightly excuse a litigant because of the lawyer's neglect without abandoning the pursuit of these objectives. *Tolliver*, 786 F.2d at 319.

Plaintiffs argue that under the facts and circumstances of this case, dismissal was too harsh a sanction. At the time of dismissal, the defendants had been embroiled in this litigation for approximately six (6) years. The Court, too, was victimized in that it spent considerable time and money attempting to administer this lawsuit, only to be

frustrated by the plaintiffs' failure to act. A lesser sanction than dismissal in an action pending for approximately six (6) years and set for trial in approximately one hundred twenty (120) days would not have been adequate. The trial court showed great patience and gave the plaintiffs numerous opportunities to comply with its orders and adequate time in which to do so. The Court, even though not required, specifically advised the plaintiffs that dismissal would result for continued failure to comply with its orders. Plaintiffs had no legal excuse or justification for their failure to continually ignore and disobey the trial rules and the orders of the trial court; dismissal was an appropriate sanction and most certainly did not impinge on the due process guaranteed to the plaintiffs under the federal Constitution.

CONCLUSION

A court of law has the basic duty to protect the rights of the parties before it and to assure that those fundamental rights are not abridged. The record before this Court leaves no doubt that the trial court dealt fairly with and extended itself to protect plaintiffs' rights. However, all parties and their attorneys have a concomitant duty to the court to file suits in good faith, and to pursue them with diligence and to comply with court rules and proper orders of the court. While the good faith of the plaintiffs *in filing* this lawsuit is not in question, the record reveals such a lack of diligence and good faith on the part of the plaintiffs, coupled with what can only be considered a willful refusal to comply with the discovery rules and the

orders of the trial court, so as to fully justify the dismissals entered in this case.

WHEREFORE, the respondent, Cole & Associates, Inc., respectfully requests this Court to deny the Petition for Writ of Certiorari to the Supreme Court of Indiana and the Indiana Court of Appeals of petitioners, Joseph Stout and Barbara Stout.

Respectfully submitted,

STEVEN A. JOHNSON *
DANIEL A. GIOIA
KATHLEEN M. MAICHER
SPANGLER, JENNINGS, SPANGLER
& DOUGHERTY, P.C.
8396 Mississippi Street
Merrillville, Indiana 46410
(219) 769-2323

Attorneys for Respondent,
COLE & ASSOCIATES, INC.

* Counsel of Record

APPENDIX

[*Letterhead Of*]

STATE OF INDIANA
CLERK OF THE SUPREME COURT
COURT OF APPEALS AND TAX COURT

DANIEL ROCK HEISER, CLERK
217 STATE HOUSE
INDIANAPOLIS, 46204
TELEPHONE 317-232-1930

DANIEL AUGUST GIOIA
8396 MISSISSIPPI ST.
MERRILLVILLE, IN 46410-0000

Cause Number
64A04-8603-CV-00070
LOWER CASE
79-PSC-3321

JOSEPH & BARBARA STOUT -V-
A.M. SUNRISE CONST. CO., ET AL

You are hereby notified that the COURT OF APPEALS has on this day 5/26/87 APPELLANT'S PETITION FOR REHEARING DENIED. WESLEY W. RATLIFF, JR., CHIEF JUDGE. SULLIVAN, J. WOULD GRANT REHEARING AS TO A.M. SUNRISE CONSTRUCTION AND WOULD DENY REHEARING AS TO COLE & ASSOCIATES. APPELLANT'S MOTION TO STRIKE GRANTED. WESLEY W. RATLIFF, JR., CHIEF JUDGE.

WITNESS my name and the seal of said Court, this 26TH day of MAY, 1987

/s/ DANIEL ROCK HEISER
Clerk Supreme Court,
Court of Appeals
and Tax Court